

NORTH CAROLINA
COURT OF APPEALS
REPORTS

VOLUME 279

17 AUGUST 2021

5 OCTOBER 2021

RALEIGH
2022

CITE THIS VOLUME
279 N.C. APP.

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OF
NORTH CAROLINA**

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1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019). Unpublished cases appear in *Italics*.

2. This opinion was moved from its original filing date and is listed in Volume 280 of the N.C. App. Reports.

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3. No opinion associated with this universal parallel citation number will appear in the N.C. App. Reports.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

85' AND SUNNY, LLC, PETITIONER
v.
CURRITUCK COUNTY, RESPONDENT

No. COA20-648

Filed 17 August 2021

1. Zoning—unified development ordinance—board of adjustment decision—review by trial court—standard of review

In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance, the trial court properly articulated and applied the appropriate standard of review for each issue on appeal.

2. Zoning—unified development ordinance—board of adjustment decision—review by trial court—application of whole record test

In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance, the trial court erred in its application of the whole record test by replacing the board's judgment—as to the number of campsites at the campground on the determinative date—with its own judgment, where the board's determination was supported by substantial evidence.

85' AND SUNNY, LLC v. CURRITUCK CNTY.

[279 N.C. App. 1, 2021-NCCOA-422]

3. Zoning—unified development ordinance—board of adjustment decision—review by trial court—new facilities

In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance (UDO), the trial court erred by reversing the board's conclusion that new facilities proposed by petitioner were an impermissible expansion, enlargement, and intensification of a nonconforming use and not permitted under the UDO. However, the trial court properly affirmed the board's conclusion that petitioner's proposed swimming pool was not permitted under the UDO.

Appeal by Respondent and cross-appeal by Petitioner from order entered 2 March 2020 by Judge L. Lamont Wiggins in Currituck County Superior Court. Heard in the Court of Appeals 8 June 2021.

Williams Mullen, by Thomas H. Johnson, Jr., and Lauren E. Fussell, for Petitioner-Appellee/Cross-Appellant.

Currituck County Attorney Donald I. McRee, Jr., for Respondent-Appellant/Cross-Appellee.

COLLINS, Judge.

¶ 1 This case arises from improvements 85 Degrees and Sunny, LLC ("Petitioner"), seeks to make to a campground located in Currituck County, North Carolina. Both Currituck County ("Respondent") and Petitioner appeal from the superior court's order reversing the Currituck County Board of Adjustment's ("Board") (1) determination of the number of campsites that existed on Petitioner's campground as of 1 January 2013, and (2) conclusion that Currituck County's Unified Development Ordinance ("UDO") permitted some, but not all, of Petitioner's proposed improvements to the campground. We affirm in part and reverse in part the superior court's order and remand to the superior court to essentially affirm the Board's entire order.

I. Procedural History and Factual Background

¶ 2 The Hampton Lodge Campground ("Campground") has existed since at least May 1967. At the time the Campground began operation, the County did not regulate the use of property by zoning regulations. Under the County's initial 1971 zoning ordinance, campgrounds were

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a permitted use of property in certain districts, subject to certain requirements. There was no documentation that the Campground's owners had complied with the 1971 ordinance's requirements for approved campgrounds and the Campground operated as a nonconforming use. The Campground has continued as a nonconforming use under subsequent County zoning regulations adopted in 1975, 1982, 1989, 1992, 2007, and 2013.

¶ 3

Under the current UDO, adopted in 2013, the Campground continues to be a nonconforming use. The UDO provides that "[a] nonconforming use shall not be changed to any other nonconforming use[.]" UDO § 8.2.2., and generally "shall not be enlarged, expanded in area, or intensified[.]" UDO § 8.2.3.A. Additionally, section 8.2.6. of the UDO deems all existing private campgrounds as nonconforming uses, subject to certain standards, including in relevant part:

A. General Standards

- (1) Camping is an allowed use of land only in existing campgrounds and campground subdivisions.

. . . .

- (5) Modifications to existing campgrounds are permitted provided the changes do not increase the nonconformity with respect to [the] number of campsites that existed on January 1, 2013.

B. Existing Campgrounds

- (1) Existing campgrounds may not be expanded to cover additional land area or exceed the total number of campsites that existed on January 1, 2013.

UDO § 8.2.6.

¶ 4

Throughout the Campground's history, owners and developers have submitted documentation to county entities reflecting varying numbers of campsites in existence. A camper subdivision plat showing over 700 campsites was submitted in 1973, but never approved. A site plan submitted alongside an application for a conditional use permit for a concert in 1996 showed 234 campsites at the property, 90 vehicular parking spaces, and a tent camping area. A site plan submitted with a similar application in 1997 again showed 234 campsites and a tent camping area.

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Neither plan indicated the specific number of tent campsites within the tent camping area.

¶ 5 Petitioner purchased the Campground in June 2018 and submitted a Major Site Plan (“Plan”) to Currituck County for review. The Plan showed 314 campsites for recreational vehicle, trailer, or camper use, and 78 campsites for tent camping. The Plan also proposed the following improvements:

- two new restroom and bathhouse facilities,
- a swimming pool and pool house,
- improvements to the on-site septic system,
- two dog park areas,
- playground improvements, and
- the demolition and replacement of an existing residence and barn for the caretaker/manager of the campground.

¶ 6 In its review of the Plan, the County determined that the number of campsites exceeded the number of campsites that existed on 1 January 2013, and the additional amenities shown on the Plan were not permitted under the UDO.¹

¶ 7 In August 2018, Petitioner filed an Application for Interpretation and supporting materials with the Currituck County Planning and Development Director (“Director”). Petitioner sought a determination of (1) the number of campsites existing on the Campground on 1 January 2013 and (2) whether the UDO allowed Petitioner’s proposed improvements to the property.

¶ 8 The Director issued a Letter of Determination (“Letter”) on 1 January 2013 wherein the Director determined “that 234 campsites have received some form of approval between 1971 and 1997 and 234 campsites existed on January 1, 2013.” The Director also determined that the number of “[t]ent campsites would need to be calculated based on the historical tent area divided by the minimum campsite size (3000 square feet) required by all zoning regulations before the 2013 UDO.” The Director could “[n]ot verify, and therefore [did] not conclude, that 78 tent campsites were established prior to January 1, 2013.”

¶ 9 Regarding Petitioner’s proposed improvements, the Director interpreted the term “modification” in section 8.2.6.A.(5) to require that

1. A copy of the County’s determination is not in the Record on Appeal but is referenced in Plaintiff’s Petition for Writ of Certiorari to the superior court.

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“something needs to exist before a change, alteration, or amendment can be made[,]” and concluded as follows: “only changes to existing buildings and structures are permitted”; existing facilities—“restroom facilities, piers, docks, bulkheads, camp store, and other recreation facilities”—could be modified; “[t]he new facilities listed in the application . . . such as the new bathroom facilities, swimming pool, pool house and the like” “are not limited changes but are substantial and an impermissible expansion, enlargement and intensification of a nonconforming use” prohibited under section 8.2.3.A.

¶ 10 Petitioner appealed to the Board. At the hearing before the Board, the Director testified to the history of permits applied for and issued to the Campground, including the 1996 and 1997 conditional use permits. Petitioner tendered Warren Eadus, who was accepted as an expert witness in site plans. Eadus testified that there were 408 RV sites and 50 tent sites at the Campground. Paul O’Neal, who resided three miles south of the Campground for 50 years, testified that he was hired to perform maintenance on the campsites in 1980. O’Neal testified that in 1980, there were 175 to 200 campsites, and the Campground had not changed from that time. John Pappas, a previous owner of the Campground, testified that there were 252 utility hookups, that a previous music festival was held with close to 400 camping units in attendance, and stargazers had camped for 25 years in the wooded portion of the property.

¶ 11 Other previous owners averred that “[c]ampers have been free to utilize the entire premises for their campsite” and “[t]here has never been a limitation imposed on the number of the sites, the location of the sites, nor occupancy by vehicles of any kind, or tents, or simply sleeping bags and campfire sites.” Ann Slade, a co-manager of the Campground since 1998, averred that the entire Campground was used “as needed for tents, trailers and recreational vehicles.” Slade averred that in addition to the campsites with utility connections, campers would use campsites in both the forested and open field areas of the property. According to Slade, during music festivals in 1995 through 1997, approximately 400 campsites were used at the Campground. Similarly, James Baeurle, Petitioner’s current operator, testified to the Board that on many occasions, 400 to 500 people camped at the campground for one event.

¶ 12 After the hearing, the Board issued an order wherein it found, in part:

27. On January 1, 2013, there were 234 existing campsites and a designated area which was used for tent camping at Hampton Lodge.

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28. The number of campsites within the tent camping area should be calculated based on the designated area for tent camping on a scaled version of the 96/97 site plan, divided by the minimum campsite size (3000 square feet) required by all zoning regulations prior to the 2013 UDO.

. . . .

36. Modifications to existing buildings and structures are permitted inasmuch as the changes do not extend to additional structures or to land outside the original structure.

37. Sunny's proposal and site plan includes the addition of new facilities to Hampton Lodge, i.e. new bathroom facilities, swimming pool, pool house, piers etc.

¶ 13

Upon its findings, the Board concluded, in relevant part:

3. Pursuant to 2013 UDO §§ 2.4.16(D)(3) and 10.1, 2013 UDO §8.2.6.A.(5) must be read in *pari materia* with the 2013 UDO, specifically 2013 UDO §8.

4. Modifications to existing buildings and structures are permitted inasmuch as the changes do not extend to additional structures or to land outside the original structure.

5. The new facilities proposed by Sunny qualify as an impermissible expansion, enlargement and intensification of a nonconforming use and are not permitted.

Based upon its findings of fact and conclusions of law, the Board affirmed the Director's Letter.

¶ 14

Petitioner petitioned the superior court for a writ of certiorari to review the Board's decision. After reviewing the record on appeal, the Plan, the UDO, and the memoranda of the Parties, and hearing oral arguments on 27 January 2020, the superior court granted certiorari and reversed the Board. By written order, the superior court found in relevant part:

12. The . . . requested number of RV and tent campsites proposed in Petitioner's Major Site Plan are

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consistent with the number of campsites in existence on Hampton Lodge on January 1, 2013. Therefore, the Court hereby allows 314 RV sites and 78 tent sites on the Property and finds the number of proposed campsites does not exceed the number of campsites in existence on the property as of January 1, 2013, and does not increase or expand the intensity of the nonconforming use, as set forth in Section 8.2.6 of the UDO. Notably, the property has potential, excluding wetland acreage, to be developed differently, and more intensely, than as proposed by Petitioner on the Major Site Plan.

13. . . . [A]ll health and safety improvements to Hampton Lodge that are included on the Major Site Plan, specifically including, infrastructure improvements to update access roads and water and septic systems on the property, do not violate the provisions of the UDO governing nonconforming uses. The new bathhouses and expansions of existing bathhouses proposed in the Major Site Plan are permitted improvements to the Property pursuant to the provisions of the UDO. The Court finds the proposed health and safety improvements to Hampton Lodge do not increase or intensify the nonconforming use and are in keeping with the public policy of the State of North Carolina to allow improvements to nonconforming uses to enhance health and safety.

14. The Major Site Plan also proposes adding a porch to the existing footprint of the Camp Store located on the property. While the proposed porch addition is not within the footprint of the Camp Store in existence on January 1, 2013, the proposed addition is an appendage that will not increase the intensity or scope of the nonconforming use. Therefore, the proposed porch on the Camp Store is allowed.

15. The Major Site Plan proposes installing a pool on Hampton Lodge. The pool is not permitted within the provisions of the UDO and is not allowed.

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16. The . . . Board of Adjustment's decision was arbitrary and capricious [and] not supported by substantial, competent and material evidence in view of the entire record as set forth above.

17. The . . . Board of Adjustment committed an error of law in concluding that the new facilities proposed by Petitioner qualify as impermissible expansion, enlargement and intensification of a nonconforming use and are not permitted under the UDO, with the exception of the swimming pool.

The superior court thus

remanded with instructions for the Board of Adjustment to reverse the [Letter] and find that at least 314 campsites for RV, trailer, or camper use and 78 sites for ordinary tent camping as shown on the Major Site Plan existed as of January 1, 2013, and that the modifications shown on the Major Site Plan, except for the pool, are in compliance with the provisions of the UDO, should be allowed, and do not increase or expand the intensity of the nonconforming use.

¶ 16 Respondent appealed and Petitioner cross-appealed.

II. Discussion

¶ 17 On appeal, Respondent contends that the superior court erred by (1) failing to articulate the standard of review applied to each issue; (2) reversing the Board's decision as to the number of campsites existing at the Campground on 1 January 2013; and (3) reversing the Board's decision that certain modifications proposed in Petitioner's Plan were not permitted under the UDO. Petitioner contends that the superior court erred by affirming the Board's determination that the swimming pool was not allowed under the UDO.

A. Standard of Review

¶ 18 A different standard of review applies at each level of an appeal from a decision of an administrative official charged with enforcing a zoning or unified development ordinance. A "board of adjustment shall hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning or unified development

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ordinance”² N.C. Gen. Stat. § 160A-388(b1) (2019); N.C. Gen. Stat. § 153A-345.1 (2019) (“The provisions of [N.C. Gen. Stat. §] 160A-388 are applicable to counties.”).³ In such an appeal, “the board of adjustment may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made.” N.C. Gen. Stat. § 160A-388(b1)(8). Additionally, “[t]he board shall have all the powers of the official who made the decision.” *Id.*

¶ 19 A party may seek superior court review of a board of adjustment’s decision by filing a petition for review in the nature of certiorari. N.C. Gen. Stat. § 160A-388(e2)(2) (2019).

(1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body’s findings, inferences, conclusions, or decisions were:

- a. In violation of constitutional provisions, including those protecting procedural due process rights.
- b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
- c. Inconsistent with applicable procedures specified by statute or ordinance.
- d. Affected by other error of law.
- e. Unsupported by substantial competent evidence in view of the entire record.
- f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k) (2019).

2. The Director is the County’s administrative official charged with enforcing the UDO, *see* UDO § 9.5.1., and is empowered to decide applications for interpretation of the UDO, *see* UDO § 2.4.16.

3. Effective 19 June 2020, the General Assembly consolidated the provisions governing planning and development regulations by local governments into a new Chapter 160D of the General Statutes. *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111 § 2; An Act to Complete the Consolidation of Land-Use Provisions Into one Chapter of the General Statutes as Directed by S.L. 2019-111, as Recommended by the General Statutes Commission, S.L. 2020-25 § 51(b).

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¶ 20 “Generally, the petitioner’s asserted errors dictate the scope of judicial review.” *NCJS, LLC v. City of Charlotte*, 255 N.C. App. 72, 76, 803 S.E.2d 684, 688 (2017). “[I]f the petitioner contends the [b]oard’s decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the whole record test.” *Id.* (quotation marks and citations omitted). In applying the whole record test, the “reviewing superior court sits in the posture of an appellate court and does not review the sufficiency of evidence presented to it but reviews that evidence presented” to the board. *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (quotation marks and citation omitted). The whole record test requires the superior court to “examine all competent evidence (the ‘whole record’) in order to determine whether the [board’s] decision is supported by substantial evidence.” *Id.* at 14, 565 S.E.2d at 17. “Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion[.]” *Sun Suites Holdings, L.L.C. v. Bd. of Aldermen of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528 (2000). “The ‘whole record’ test does not allow the reviewing court to replace the board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.” *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 17-18 (citation omitted).

¶ 21 Where a party contends the board’s decision was based on an error of law, *de novo* review is proper. *Id.* at 13, 565 S.E.2d at 17. Under *de novo* review, the superior court “consider[s] the matter anew[] and freely substitutes its own judgment for the agency’s judgment.” *Sutton v. N.C. Dep’t of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999).

¶ 22 A superior court may apply both the whole record test and *de novo* review in a single case, “but the standards are to be applied separately to discrete issues.” *Sun Suites*, 139 N.C. App. at 273-74, 533 S.E.2d at 528 (citations omitted). This Court reviews a superior court’s order reviewing a board’s decision to determine “whether the superior court applied the correct standard of review” and “whether the superior court correctly applied that standard.” *Myers Park Homeowners Ass’n, Inc. v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013) (quotation marks, brackets, and citation omitted).

B. Superior Court’s Articulated Standards of Review

¶ 23 [1] At the outset, Respondent argues that the superior court’s order must be vacated for failure to articulate the standard of review it applied to each issue. We disagree.

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¶ 24 When reviewing an order by a county board of adjustment, a superior court “must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.” *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (quotation marks and citations omitted). In this case, Petitioner alleged before the superior court that: the Board’s decision to affirm the Letter was arbitrary and capricious; the Board’s conclusion that only 234 campsites existed as of 1 January 2013 was arbitrary and capricious and was not supported by substantial, competent, and material evidence; the Board committed an error of law in concluding that Petitioner was permitted to modify existing facilities but not construct new facilities; and the Board’s decision to affirm the Letter was an abuse of discretion.

¶ 25 The superior court’s order specifically recites these allegations. The superior court’s findings, along with its conclusion that “the Board of Adjustment’s decision was arbitrary and capricious [and] not supported by substantial, competent and material evidence in view of the entire record as set forth above[,]” was sufficient information to reveal that the superior court applied the whole record test to Petitioner’s arguments that the Board’s decision to affirm the Letter was arbitrary and capricious and the Board’s conclusion that only 234 campsites existed as of 1 January 2013 was arbitrary and capricious and was not supported by substantial, competent, and material evidence. Additionally, the superior court’s order specifically articulated the *de novo* standard for Petitioner’s argument that the Board committed an error of law in applying the UDO to the proposed improvements. It is evident that the superior court articulated the correct standard of review it applied to each issue.

C. Determination of the Number of Campsites

¶ 26 [2] Respondent argues that the superior court failed to correctly apply the whole record test in its review of the Board’s conclusion that, as of 1 January 2013, 234 improved campsites and a number of tent campsites—determined by dividing the delineated tent camping area by 3,000 square feet—existed at the Campground. Respondent contends that there was substantial evidence in the record to support the Board’s conclusion.

¶ 27 The Board found, in relevant part, as follows:

19. In 1996 and 1997, Hampton Lodge applied for two special event permits at which time they submitted a site plan of the campground. The site plan shows 234 campsites, 90 vehicular parking spaces

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and an area for tent camping. The same site plan was submitted in 1996 and 1997.

20. The 96/97 site plan was used at Hampton Lodge to direct customers to campsite locations until the campground was sold to Sunny in 2018.

....

25. The 96/97 site plan is the most competent evidence regarding the number of campsites that existed at Hampton Lodge on January 1, 2013.

26. The site plans submitted by Sunny demonstrate 392-700 “potential” campsites for Hampton Lodge, not existing campsites on January 1, 2013, as required by UDO 8.2.6.A.(5).

27. On January 1, 2013, there were 234 existing campsites and a designated area which was used for tent camping at Hampton Lodge.

28. The number of campsites within the tent camping area should be calculated based on the designated area for tent camping on a scaled version of the 96/97 site plan, divided by the minimum campsite size (3000 square feet) required by all zoning regulations prior to the 2013 UDO.

¶ 28

The Board’s findings were supported by the 1996 and 1997 site plans. These site plans, submitted to county entities by previous owners of the campgrounds, each showed 234 campsites and a tent camping area. The Board found that these site plans were used until 2018 “to direct customers to campsite locations,” a finding that is not specifically challenged by Petitioner and is therefore binding on appeal. *See Church v. Bemis Mfg. Co.*, 228 N.C. App. 23, 26, 743 S.E.2d 680, 682 (2013) (“Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.”). The Director also testified that when she visited the Campground in June 2018, the tent area was marked with a single sign and corresponded to the tent area shown on the 1996 and 1997 site plans. Because a “reasonable mind might accept” this evidence “as adequate to support” the Board’s determination of the number of campsites, the Board’s determination was supported by substantial evidence. *See Sun Suites*, 139 N.C. App. at 273, 533 S.E.2d at 528.

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¶ 29 Petitioner argues that evidence in the record suggested a greater number of campsites than found by the Board. This evidence, Petitioner contends, supports the superior court's findings that 314 campsites for RV, trailer, or camper use, and 78 campsites for tent camping existed at the campground on 1 January 2013, and that "the property has potential, excluding wetland acreage, to be developed differently, and more intensely, than as proposed by Petitioner." While the court must take into account "contradictory evidence or evidence from which conflicting inferences could be drawn[.]" "[t]he 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo[.]" *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

¶ 30 Here, the Board's determination of the number of campsites was supported by substantial evidence. Although there was the evidence from which conflicting inferences could have been drawn, the superior court erred by replacing the Board's judgment with its own, even if "the court could justifiably have reached a different result had the matter been before it de novo[.]" *Id.* The superior court thus incorrectly applied the whole-record test to the issue of the number of campsites at the Campground on 1 January 2013.

D. Proposed Improvements to the Campground

¶ 31 [3] Respondent also contends that the superior court erred by reversing the Board's conclusion that the UDO prohibited certain of the proposed improvements to the campground. Respondent argues that the Board correctly concluded that both the general standards regarding nonconforming uses and the specific provisions concerning nonconforming campgrounds apply to Petitioner's proposed improvements.

¶ 32 Petitioner, on the other hand, argues that the superior court correctly reversed the Board's conclusion that the UDO prohibited certain of the proposed improvements to the campground, but erred by affirming the Board's conclusion that the pool was not a permissible improvement. Petitioner argues that only the specific provisions concerning nonconforming campgrounds in Chapter 8 control, and that the Board committed an error of law by applying the general standards of the UDO concerning nonconforming uses. In Petitioner's view, all of its proposed improvements are permitted under the UDO because they do not expand the Campground's land area or add to the number of campsites that existed on 1 January 2013.

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¶ 33 The resolution of this dispute turns on the proper construction of Chapter 8 of the UDO. Chapter 8 of the UDO regulates nonconforming uses. While nonconforming uses “are allowed to continue, and are encouraged to receive routine maintenance[,]” UDO § 8.1.2., the “purpose and intent” of Chapter 8 “is to regulate and limit the continued existence” of nonconforming uses. UDO § 8.1.1. Non-conforming uses and structures “are not favored under the public policy of North Carolina, and zoning ordinances are construed against indefinite continuation of a non-conforming use.” *Jirtle v. Bd. of Adjustment for the Town of Biscoe*, 175 N.C. App. 178, 181, 622 S.E.2d 713, 715 (2005) (quotation marks and citation omitted).

¶ 34 Section 8.2.3. provides general standards concerning the “[e]xpansion and [e]nlargement” of nonconforming uses:

A. Except in accordance with this subsection, a nonconforming use shall not be enlarged, expanded in area, or intensified.

B. An existing nonconforming use may be enlarged into any portion of the structure where it is located provided the area for proposed expansion was designed and intended for such use prior to the date the use became a nonconformity. In no instance shall a nonconforming use be extended to additional structures or to land outside the original structure.

C. Open air uses that are nonconformities, including but not limited to outdoor sales areas, parking lots, or storage yards, shall not be extended to occupy more land area than that in use when the open air use became nonconforming.

U.D.O. § 8.2.3.

¶ 35 Chapter 8 also contains specific provisions governing nonconforming campgrounds. “Existing campgrounds may not be expanded to cover additional land area or exceed the total number of campsites that existed on January 1, 2013.” UDO § 8.2.6.B.(1). “Modifications to existing campgrounds are permitted provided the changes do not increase the nonconformity with respect to the number of campsites that existed on January 1, 2013.” UDO § 8.2.6.A.(5).

¶ 36 Ordinary principles of statutory construction apply to local zoning ordinances such as the UDO. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638

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(2001). Generally, “when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls.” *High Rock Lake Partners, LLC v. N.C. Dep’t of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (citations omitted). But our courts have also recognized that, where possible, general and specific provisions addressing the same subject “should be read together and harmonized[.]” *LexisNexis Risk Data Mgmt. v. N.C. Admin. Off. of Cts.*, 368 N.C. 180, 186, 775 S.E.2d 651, 655 (2015) (quotation marks and citations omitted).

¶ 37 Here, it is possible to construe the general provisions concerning nonconforming uses and the specific provisions concerning campgrounds harmoniously: Section 8.2.3. applies to all nonconforming uses, including nonconforming campgrounds, while section 8.2.6. imposes additional requirements on nonconforming campgrounds. Thus, modifications to a nonconforming campground may not result in it being “enlarged, expanded in area, or intensified[.]” UDO § 8.2.3.A., nor may modifications expand a campground beyond the land area or number of campsites existing as of 1 January 2013, UDO § 8.2.6.B.(1), or otherwise “increase the nonconformity with respect to the number of campsites that existed” on that date, UDO § 8.2.6.A.(5). This construction satisfies the “cardinal rule of statutory construction that significance and effect should . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.” *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975) (quotation marks and citation omitted).

¶ 38 Moreover, Petitioner’s interpretation of Chapter 8 is contrary to the principle that “[a] construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990) (quoting *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)). Petitioner’s interpretation would allow any and all improvements to a nonconforming campground so long as they do not enlarge the campground’s land area or number of campsites beyond that which existed on 1 January 2013 or otherwise change the campground to another nonconforming use under section 8.2.2. Under this interpretation, an owner could indefinitely extend the lifespan of a nonconforming campground by regularly upgrading the campground with new amenities. This would contradict the stated purposes of Chapter 8 to “regulate and *limit* the continued existence” of nonconforming uses, UDO § 8.1.1. (emphasis added), and promote the continued viability of a land use that the County has deemed “generally incompatible with the permitted uses in the district[.]” see UDO § 8.2.1. (defining nonconforming uses).

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¶ 39 The Board's determination that "[t]he new facilities proposed by [Petitioner] qualify as an impermissible expansion, enlargement and intensification of a nonconforming use and are not permitted" was in accordance with law, consistent with the purpose and intent of UDO Chapter 8 regulating and limiting the continued existence of nonconforming uses, and properly preserved the legislative body's intent. The trial court did not err by affirming the Board's conclusion that the pool was not a permissible proposed improvement. However, the trial court erred by reversing the Board's conclusion that the remainder of the new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted.

III. Conclusion

¶ 40 The superior court articulated the proper standard of review to apply to each issue on appeal.

¶ 41 The superior court incorrectly applied the whole record test to the Board's determination of the number of campsites on Petitioner's campground as of 1 January 2013 as the Board's decision concerning the number of campsites on the Campground was supported by substantial, competent evidence in view of the entire record.

¶ 42 The superior court correctly applied *de novo* review and properly affirmed the Board's conclusion that Petitioner's proposed swimming pool is an impermissible expansion, enlargement, and intensification of a nonconforming use and is not permitted under the UDO. The superior court incorrectly applied *de novo* review and erred by reversing the Board's conclusion that the remaining new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted.

¶ 43 Accordingly, we affirm the portion of the superior court's order that affirms the Board's conclusion regarding the pool. We reverse the remainder of the superior court's order and remand this matter to the superior court to affirm the remainder of the Board's order. The net result is that the Board's order is affirmed.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge STROUD and Judge WOOD concur.

GRIBBLE v. BOSTIAN

[279 N.C. App. 17, 2021-NCCOA-423]

GLENDA K. GRIBBLE, PLAINTIFF

v.

CHARLES D. BOSTIAN, JR. AND WIFE ALMA JEAN BOSTIAN, DEFENDANTS

No. COA20-412

Filed 17 August 2021

1. Easements—appurtenant—expressly granted by deed—location left to later agreement—determination by court—evidentiary support

In an action to determine easement rights between owners of adjacent lots, there was ample evidence to support the trial court's findings of fact regarding the existence of an appurtenant easement, but not the location of the easement chosen by the court (in an area that neither party advocated for). Instead, the following evidence supported placing the easement along a dirt path: the deed conveying one portion of a property to defendant ("Tract 2," the dominant estate) expressly reserved a thirty-foot right-of-way across another portion of the property ("Tract 1," the servient estate) to enable users of Tract 2 to reach a public road; the deed left the location of the easement to be agreed upon later by the parties; at the time of the deed, there already existed a dirt path across Tract 1 which connected Tract 2 and the road; defendant's regular use of the dirt path for years after acquiring Tract 2 was acquiesced to by the owner of Tract 1; and no other portion of Tract 1 was used for ingress and egress by defendants.

2. Easements—appurtenant—expressly created by deed—easement right restricted—benefit only to one tract

In an action to determine easement rights between owners of adjacent lots, an appurtenant easement expressly created by deed across one tract to benefit a second tract (to enable users of the second tract to access a public road) did not create an easement right to access or benefit any other land adjacent to those two tracts.

3. Evidence—determination of easement rights—statements by deceased former property owner—Dead Man's Statute—waiver

In an action to determine easements rights between owners of adjacent lots, plaintiff waived application of the Dead Man's Statute where her counsel asked defendant repeatedly about conversations he had with the former (deceased) owner of both tracts. Further,

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statements by the former owner were properly admitted, not only pursuant to Evidence Rule 804 as statements from an unavailable witness, but also as statements against the former owner's pecuniary interests (since the former owner acquiesced to defendant's use of a dirt path, across his property in order to reach a public road, as an easement).

Appeal by Plaintiff and Defendants from amended order entered 21 January 2020 by Judge Joseph N. Crosswhite in Rowan County Superior Court. Heard in the Court of Appeals 24 February 2021.

Hartsell & Williams, PA, by Austin "Dutch" Entwistle III, for the Plaintiff-Appellant.

Shelby, Pethel, and Hudson, P.A., by John T. Hudson, for the Defendants-Appellees.

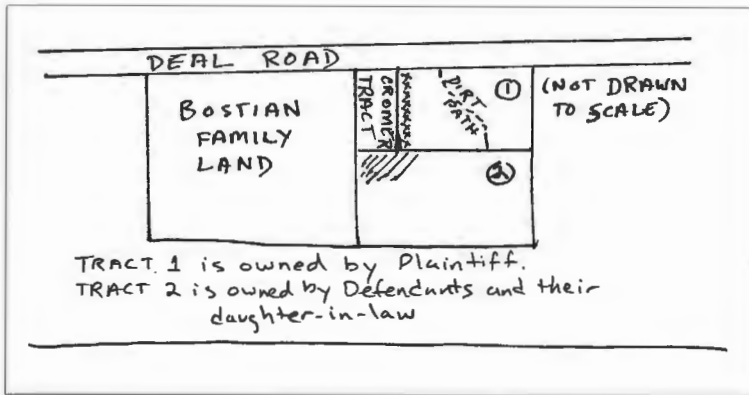
DILLON, Judge.

¶ 1 Plaintiff and Defendants own adjoining tracts of land, which are the subjects of this action. Specifically, Plaintiff owns the tract labeled as Tract 1 on the map below; Defendants own Tract 2. Plaintiff's tract abuts a public road, while Defendants' tract does not. The issues in this case are whether Defendants have easement rights over Plaintiff's tract to access the public road and, if so, where is the location of said easement on Plaintiff's tract. The matter was tried without a jury. The background contained herein reflects the findings as made by the trial judge. The map below is provided for a better understanding of the trial court's findings.

¶ 2 Prior to 1991, the tracts below labeled as Tract 1, Tract 2, and the Cromer Tract were all part of a single tract owned by Plaintiff's father, Glenn Smith. The tract labeled as the "Bostian Family Land" was owned by various members of the family of Defendant Charles D. Bostian. By 1991, Mr. Bostian took title to a portion of the Bostian Family Land adjacent to Tract 2.

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¶ 3 The “dirt path” as depicted on the map running through Tract 1 identifies the approximate location of a dirt path that Mr. Smith used for decades to access the rear portion (the area labeled “Tract 2”) of his property.

¶ 4 In 1991, Mr. Smith conveyed to Mr. Bostian by deed (the “1991 Deed”) the rear portion of his large tract, specifically the area labeled as Tract 2. The 1991 Deed also contained language granting Mr. Bostian an easement across Mr. Smith’s remaining land (labeled as Tract 1) at a location *to be agreed upon* by Mr. Bostian and Mr. Smith, as follows:

Together with a right-of-way thirty (30) feet in width running from Deal Road to this property, the exact location of said right-of-way to be agreed upon between the parties or their successors and assigns.

¶ 5 Over the next fourteen years, between 1991 and 2005, Mr. Smith and Mr. Bostian never agreed in writing where the easement referenced in the 1991 Deed would be located. The trial court did not make any findings as to whether Mr. Smith and Mr. Bostian expressly orally agreed as to the easement location. (The evidence was conflicting as to whether they had orally agreed that the dirt path would serve as the easement.) In any event, Mr. Bostian began and continued to utilize the dirt path to access Tract 2 from Deal Road. Mr. Smith acquiesced to Mr. Bostian’s use of the dirt path, never complaining or objecting. There is no evidence that Defendants ever used any other portion of Tract 1 as an easement to access Tract 2. Further, there was no evidence offered by either party that the easement was at a location on Tract 1 other than along the dirt path.

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¶ 6 In 2005, Mr. Smith died. Plaintiff inherited Tract 1, the tract where the dirt path is located, from her father Mr. Smith.¹ Plaintiff desired to sell Tract 1 but learned that potential buyers were deterred by the existence of a dirt path running through the middle of that tract. One day after her father's funeral, Plaintiff placed posts to block the dirt path. These posts were quickly removed after Defendants complained, claiming to have easement rights in the dirt path.

¶ 7 At some later point, Defendants' daughter-in-law, who is not a party to this appeal, came to own a portion of Tract 2, specifically the area on Tract 2 labeled with the slanting lines.

¶ 8 In 2018, Plaintiff commenced this matter to resolve the easement dispute. Following a bench trial, the trial court entered its Amended Order, determining that Plaintiff's Tract 1 is burdened by an appurtenant easement in favor of Tract 2.² However, the trial court did not determine that the easement was located along the existing dirt path. Rather, the trial court determined that the location of the easement would be along Tract 1's boundary with the Cromer Tract, in the area labeled by the x's ("xxxxx") on the above map, notwithstanding that no party ever advocated for this location nor was there any evidence that Defendants or anyone ever used this location to access Tract 1. Plaintiff and Defendants each noticed an appeal.

I. Standard of Review

¶ 9 The standard of review from a bench trial is whether there exists competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013). Since the trial judge acts as the factfinder, the trial court resolves any conflicts in the evidence; any findings made by the trial judge are binding on appeal if supported by competent evidence. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). "Conclusions of law drawn by the trial judge from the findings of fact are reviewable de novo on appeal." *Humphries v. Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

1. Plaintiff did not inherit the portion of land labeled as the Cromer Tract. Rather, at some point before his death, Mr. Smith conveyed the Cromer Tract to Michael Cromer. This Cromer Tract is not relevant to the present dispute between Plaintiff and Defendants.

2. The original order was improperly titled "Plaintiff's Trial Brief," so the court filed an Amended Order to correct its scrivener's error.

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II. Analysis

¶ 10 For the reasons stated below, we conclude that the trial court's findings support the portion of its Amended Order determining that Defendants have easement rights across Plaintiff's tract to access the tract conveyed to Mr. Bostian in 1991. However, we further conclude that the trial court's findings do not support the portion of its Amended Order determining *the location* of the easement to be along the edge of Tract 1. The findings only support a determination that the easement is located along the dirt path. We modify the trial court's Amended Order accordingly.

¶ 11 By locating the easement along the edge of Plaintiff's tract—a location no one advocated for and for which no evidence was offered—it appears that the trial court sought to achieve a compromise by recognizing an easement in favor of Defendants, but in a way that would cause Plaintiff minimal economic harm. However, we must follow the law; and the law requires that the facts, as found by the trial court, must lead to the conclusion that the dirt path is the easement.

A. Mr. Smith's 1991 Deed Created an Express Easement
Along the Dirt Path

¶ 12 **[1]** Our courts have taken a lenient approach in recognizing easements that are expressly granted but where the grant does not expressly state the easement's precise location on the servient estate. Our Supreme Court has long held that the Statute of Frauds is satisfied so long as the dominant and servient estates are identified and the *nature* of the easement is sufficiently described in the writing:

No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms[.]

The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements.

Hensley v. Ramsey, 283 N.C. 714, 730, 199 S.E.2d 1, 10 (1973) (citation omitted). That Court has held that where the location of the easement itself is not expressed in the grant, its location is established when the owner of the dominant estate makes reasonable use of a portion of the servient estate for ingress and egress, and this use is acquiesced to by the owner of the servient estate:

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It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and use of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant.

Borders v. Yarbrough, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953). This holding was reaffirmed by that Court in *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 269-70, 192 S.E.2d 449, 455 (1972).

¶ 13 Our Supreme Court later held that the subsequent owner of the servient tract (such as Plaintiff in the present case) is bound as to the location of the easement where that location was acquiesced to by her predecessor in title (Plaintiff's father in this case) who created the easement:

The use of roads in question by [the owners of the dominant estate], acquiesced in by [the] predecessors in title of the servient estate, sufficiently locates the roads on the ground, which is deemed to be that which was intended by the reservation of the easements.

Allen v. Duvall, 311 N.C. 245, 251, 316 S.E.2d 267, 271 (1984) (citing *Borders*, 237 N.C. at 542, 75 S.E.2d at 543).

¶ 14 In the present case, the trial court found facts amply supported by the evidence,³ as follows: Mr. Smith executed the 1991 Deed conveying the rear portion of his tract to Defendants. For decades prior to 1991, the dirt path was located on Mr. Smith's land and was used to access the rear portion of his tract from Deal Road. The 1991 Deed contains language identifying the dominant tract being conveyed (Tract 2) and the servient estate (Mr. Smith's retained land (Tract 1)), and the nature of the easement being granted (a 30-foot-wide easement running from Deal Road to the dominant estate being conveyed). The 1991 Deed does not expressly identify the exact location of the easement being granted but contemplates that the parties would later agree as to the location. Although the parties never entered into any written agreement regarding the location of the easement, Mr.

3. Plaintiff argues that the trial court erred by admitting evidence concerning statements made by Mr. Smith, in violation of the Dead Man's Statute and the Rules of Evidence. We disagree, but even if the trial court did err, there is still considerable evidence outside the testimony to support our conclusion.

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Bostian began to use and continued to use the dirt path to access his dominant estate from the time Mr. Smith conveyed that tract to him until Mr. Smith's death. Mr. Smith acquiesced to Mr. Bostian's use of the dirt path for ingress and egress. And when Defendants finished paying for Tract 2, Mr. Smith had a survey prepared showing the dirt path leading from Deal Road to Tract 2, with no other easement leading to Tract 2 from Deal Road.

¶ 15 There was no evidence offered or finding made that Mr. Bostian ever used, or that he and Mr. Smith ever discussed him using, the area that the trial court ultimately determined to be the location of the easement (labeled by the x's). This location was apparently picked by the trial court on its own. In fact, the record reveals no evidence offered or finding made that any portion of the servient estate that Plaintiff now owns, other than the dirt path, was ever used by Defendants for ingress and egress to their dominant estate.

¶ 16 Following our Supreme Court precedent, we must conclude that the findings of the trial court compel a judgment that the dirt path located on Tract 1 constitutes an appurtenant easement for the benefit of Tract 2.

B. The Dirt Path Easement Benefits Only Tract 2

¶ 17 **[2]** We are cognizant that Mr. Bostian also owns part of the "Bostian Family Land" tract, adjacent to his Tract 2. However, following our Supreme Court precedent, we conclude that the easement granted by Mr. Smith in his 1991 Deed only grants Mr. Bostian (and his successors in title to Tract 2) the right to use the dirt path to access Tract 2; the grant did not create easement rights to access any other land, including the Bostian Family Land. Specifically, our Supreme Court has held that:

One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, [even if] such land is within the same inclosure with that to which the easement belongs[.]

* * *

The way is granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land . . . without the consent of the owner of the servient estate.

Wood v. Woodley, 160 N.C. 17, 19-20, 75 S.E. 719, 720 (1912); see *Hales v. R.R.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916) ("[A]n easement of right

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of way over another's property is appurtenant to the particular piece of ground of the dominant owner with which it is granted, and is not personal to the owner, [and he is not] authoriz[ed] to use it in connection with other real estate he may own abutting the right of way.”); *see also Meyers v. Reaves*, 193 N.C. 172, 178, 136 S.E. 561, 564 (1927) (“One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached[.]”).

C. Evidentiary Analysis

¶ 18 **[3]** Plaintiff takes issue with many of the evidentiary determinations made by the trial court, arguing that there were violations of the Dead Man's Statute and the North Carolina Rules of Evidence, prohibiting certain hearsay evidence of what Mr. Smith, now deceased, might have said concerning certain matters.

¶ 19 Our resolution of this appeal does not rely on what Mr. Smith might have said, but rather is supported by the other evidence. Notwithstanding, we conclude that Plaintiff waived application of the Dead Man's Statute by opening the door to the testimony regarding what Mr. Smith might have said. *See Davison v. Land Co.*, 126 N.C. 704, 708, 36 S.E. 162, 163 (1900). Specifically, Plaintiff's counsel asked Mr. Bostian repeatedly about conversations he had with Mr. Smith. Further, to the extent that Mr. Smith's statements offered at trial constituted hearsay, these statements fall within an exception that allows into evidence statements made by an unavailable witness. N.C. Gen. Stat. § 8C-1, Rule 804 (2018) (a witness is “unavailable” because he is “unable to be present or to testify at the hearing because of death[.]”). Further, when a declarant is unavailable, “North Carolina cases have recognized declarations against pecuniary or proprietary interest as an exception to the hearsay rule.” *See Brandis on North Carolina Evidence* § 147 (1982). Any statement by Mr. Smith which would tend to show that he acquiesced to the dirt path being the easement—a path that runs through the middle of the tract—would have been against his pecuniary interests.

III. Conclusion

¶ 20 We affirm the portion of the trial court's Amended Order determining that Defendants have appurtenant easement rights across Plaintiff's tract to access the tract Mr. Bostian acquired from Mr. Smith in 1991.

¶ 21 We modify the portion of the trial court's Amended Order locating the easement along the edge of Tract 1 following its boundary with the Cromer Tract. We declare, based on the trial court's findings of fact, that the easement location is a thirty-foot wide path that includes the dirt

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path that Defendants have been using which runs through the middle of Plaintiff's tract, a use that was acquiesced to by Mr. Smith.

AFFIRMED IN PART, MODIFIED IN PART.

Judges INMAN and JACKSON concur.

STATE OF NORTH CAROLINA
v.
LA-AMEL CLARENCE McDOUGALD

No. COA20-514

Filed 17 August 2021

1. Criminal Law—motion for mistrial—testimony that defendant's photo came from jail archives—prejudice analysis—curative jury instruction

The trial court did not abuse its discretion by denying defendant's motion for a mistrial after a jury found defendant guilty of robbery with a dangerous weapon. Defendant was not prejudiced by a detective's testimony that photos of defendant used in a photographic lineup came from "jail archives," since the testimony was not specific and did not amount to evidence that defendant had committed another crime. Moreover, any error was cured by the trial court's immediate instruction to the jury to disregard the detective's statement.

2. Constitutional Law—effective assistance of counsel—direct appeal—dismissed without prejudice

Defendant's ineffective assistance of counsel claim on direct appeal from his conviction for robbery with a dangerous weapon was dismissed without prejudice where the cold record was insufficient for the appellate court to determine whether counsel's performance in failing to challenge a photographic lineup was deficient.

Judge MURPHY concurring in part and concurring in result only in part by separate opinion.

Appeal by Defendant from final judgment entered 18 November 2019 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 8 June 2021.

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[279 N.C. App. 25, 2021-NCCOA-424]

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander G. Walton, for the State-Appellee.

Unti & Smith, PLLC by Sharon L. Smith for the Defendant.

CARPENTER, Judge.

¶ 1 La-Amel Clarence McDougald (“Defendant”) appeals the trial court’s denial of his motion for a mistrial and the judgment entered 18 November 2019, after a jury found him guilty of robbery with a dangerous weapon. Defendant also appeals on the basis of Ineffective Assistance of Counsel (“IAC”). We find the trial court did not err in denying the motion for mistrial; accordingly, we affirm the trial court and dismiss Defendant’s IAC claim without prejudice.

I. Factual Background and Procedural History

¶ 2 Gary McLean (“Mr. McLean”) owned a video game store in Red Springs, North Carolina. While working at his store on 1 April 2017, Mr. McLean became the victim of an armed robbery. Mr. McLean testified an SUV arrived at the store and two men jumped out, one wearing a mask and the other not wearing a mask. The unmasked man confronted Mr. McLean with an assault rifle; told him to get on the ground; and took his wallet, cell phone, and approximately \$400 in cash. Mr. McLean reported the robbery to the Robeson County Sheriff’s Office and identified Defendant as one of the assailants from a photographic lineup shown to him by Detective Craig Smith.

¶ 3 Defendant was tried in Superior Court on 18 November 2019 on one count of conspiracy to commit robbery with a dangerous weapon and one count of robbery with a dangerous weapon. At trial, Detective Smith testified he prepared the photographic lineup by accessing photos from the “jail archives.” Defendant’s trial counsel objected to Detective Smith’s testimony concerning the photographic lineup, contending the testimony unfairly prejudiced Defendant. The trial court sustained the objection and instructed the jury, “the objection is sustained . . . [y]ou are not to consider the last response of the witness at this time as evidence.” Defendant testified that he was present at the scene to “buy some pills,” but denied taking part in the robbery. On cross-examination, Defendant admitted to multiple criminal convictions including common law robbery, felony assault inflicting serious bodily injury, and one count of possession of firearm by a felon. Defense counsel later made a motion for mistrial, which was denied. The trial court dismissed the conspiracy charge upon Defendant’s motion at the close of the State’s evidence, but

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the jury found Defendant guilty of robbery with a dangerous weapon. Defendant gave oral notice of appeal in court on 19 November 2019.

II. Jurisdiction

¶ 4 This Court has jurisdiction over the final judgment entered by the trial court on 18 November 2019 under N.C. Gen. Stat. § 7A-27(b)(1) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019).

III. Issues

¶ 5 The issues presented on appeal are: (1) whether the trial court erred in denying Defendant’s motion for a mistrial after Detective Smith testified the photographs used in the jail lineup were obtained from “jail archives”; and (2) whether Defendant’s Sixth Amendment right to effective assistance of counsel was violated when his counsel failed to challenge the photographic lineup’s compliance with the Eyewitness Identification Reform Act (“EIRA”).

IV. Analysis*A. Denial of Defendant’s Motion for Mistrial*

¶ 6 **[1]** Defendant argues the trial court improperly denied his motion for mistrial because the court’s instruction to the jury on Detective Smith’s testimony was insufficient to cure its prejudicial effect. Accordingly, Defendant argues the trial court abused its discretion in denying the motion for mistrial. We disagree.

1. Standard of Review

¶ 7 This Court reviews a trial court’s denial of a motion for mistrial under an abuse of discretion standard. *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008).

2. Discussion

¶ 8 The trial court “*may* declare a mistrial at any time during the trial,” but the court “*must* declare a mistrial upon the defendant’s motion if there occurs during the trial an error . . . resulting in substantial and irreparable prejudice to the defendant’s case.” N.C. Gen. Stat. § 15A-1061 (2019) (emphasis added). Whether a defendant’s case has been irreparably and substantially prejudiced is a decision within the “sound discretion” of the trial court and will not be disturbed absent an abuse of discretion. *See State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 772 (1992) (“The decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable.”).

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¶ 9 In determining the prejudicial effect of evidence, this Court looks to “the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict.” *State v. Aycoth*, 270 N.C. 270, 272, 154 S.E.2d 59, 60 (1967). “When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured.” *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). However, some instructions from a trial court are insufficient to cure prejudice. *See Aycoth*, 270 N.C. at 272-73, 154 S.E.2d at 60-61, citing *State v. Aldridge*, 254 N.C. 297, 118 S.E.2d 766 (1961) (“Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case.”). Thus, we first address whether Defendant was prejudiced by Detective Smith’s testimony, and second, address whether the trial court’s instruction to the jury was curative.

a. Prejudicial Nature of Detective Smith’s Testimony

¶ 10 At trial, Detective Smith testified the photographs used in compiling the photographic lineup were obtained from the “jail archives.” Defendant specifically argues this testimony was prejudicial, as it “directly informed the jury [Defendant] had previously been arrested” and had a criminal history. Defendant argues this testimony is analogous to the testimony in *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), and thus a motion for mistrial should have been granted. We disagree.

¶ 11 In *Aycoth*, the North Carolina Supreme Court recognized that, generally, in a prosecution for a particular crime “the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense.” *Id.* at 272, 154 S.E.2d at 60. The Court further recognized that in some instances, because of the “serious character and gravity of the incompetent evidence,” it is difficult for the jury to erase it from their minds. *Id.* at 272, 154 S.E.2d at 60. In *Aycoth*, a witness for the State testified the car he saw at the scene of the crime belonged to the defendant because it was the same car the defendant drove when he was arrested for murder. *Aycoth*, 270 N.C. at 272, 154 S.E.2d at 60. The *Aycoth* Court held such testimony was prejudicial as it suggested to the jury the defendant committed murder, and the trial court could not proceed without material prejudice to the defendant. *Id.* at 273, 154 S.E.2d at 61. Accordingly, the Court reversed the trial court’s denial of a motion for mistrial. *Id.* at 273, 154 S.E.2d at 61.

¶ 12 The testimony in this case is distinguishable from the testimony in *Aycoth*. Detective Smith testified the pictures he used for the photographic lineup were obtained from the “jail archives,” whereas the witness in

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Aycoth specifically testified that the defendant had been arrested for murder. *See Aycoth*, 270 N.C. at 272, 154 S.E.2d at 60. In the case at bar, Detective Smith's testimony is not specific and does not amount to evidence "tending to show that the accused has committed another distinct, independent, or separate offense." *Aycoth*, 270 N.C. at 272, 154 S.E.2d at 60. Detective Smith's testimony did not "directly inform[] the jury that [Defendant] had previously been arrested," as Defendant claims.

¶ 13 Further, in *State v. Moore*, the Supreme Court did not overturn a trial court's denial of a motion for mistrial after a witness testified Moore had previously "killed one person," and the trial court instructed the jury not to consider that testimony. *State v. Moore*, 276 N.C. 142, 148, 171 S.E.2d 452, 457 (1970). In response to numerous questions, a witness stated four times that he knew Moore "killed one person." *Id.* at 148, 171 S.E.2d at 457. The *Moore* Court held the defendant was not prejudiced as the testimony did not suggest that he had been arrested, tried, or convicted. *See Moore*, 276 N.C. at 149, 171 S.E.2d at 458 (holding the question "was the killing accidental, in self-defense, or felonious?" contained no suggestion the homicide was the result of a criminal act or that defendant had been prosecuted for it.). Similarly, in this case, Detective Smith testified the photographs for the lineup were from the "jail archives," and there was no mention of Defendant's arrests, convictions, or other criminal history. *See Moore*, 276 N.C. at 149, 171 S.E.2d at 457. The testimony at issue in the case at bar is more indefinite than the testimony in *Moore*. *See Moore*, 276 N.C. at 148, 171 S.E.2d at 457. Therefore, we hold Defendant was not prejudiced by the testimony.

¶ 14 Additionally, if there was any difficulty for the jurors to erase from their mind the fact of Defendant's criminal history, *see Aycoth*, at 272, 154 S.E.2d at 60, Defendant created the difficulty himself. In *Moore*, the Supreme Court held there were no subsequent statements at trial that emphasized the witness's inconclusive testimony that Moore "killed one person." *Moore*, 276 N.C. at 147, 171 S.E.2d at 457. Here, the only statements that directly informed the jury of Defendant's criminal history were made by Defendant himself on both direct and cross-examination. Thus, Defendant was not prejudiced by Detective Smith's testimony.

b. Curative Nature of Trial Court's Instruction

¶ 15 Notwithstanding our holding the testimony was not prejudicial, we address the curative nature of the trial court's instruction to the jury. Defendant argues the trial court's instruction to the jury to "not consider the last response of the witness at this time as evidence," was vague and insufficient to cure the prejudice of Detective Smith's testimony. We disagree.

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¶ 16 Ordinarily, when a trial court instructs the jury not to consider prejudicial evidence, the prejudice is cured. *See State v. Black*, 328 N.C. at 200, 400 S.E.2d at 404. North Carolina courts have long recognized the presumption jurors will understand and comply with those instructions. *See State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972) (“[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so.”) *citing Wilson v. Branning Mfg. Co.*, 120 N.C. 94, 26 S.E. 629 (1897)). Further, this Court has recognized instructions as curative when counsel immediately objects, and the trial court sustains the objection and issues a curative instruction. *See State v. Sheridan*, 263 N.C. App. 697, 705, 824 S.E.2d 146, 153 (2019) (holding after defense counsel’s immediate objection, which was sustained, the trial court gave a sufficiently curative instruction to the jury by stating: “with regard to the last remark by this witness you are to disregard that remark and not consider it as part of your consideration towards a deliberation to a verdict in this case.”).

¶ 17 In the case *sub judice*, following Detective Smith’s testimony regarding the photos used in the photographic lineup, defense counsel objected and the objection was sustained. The trial court then instructed the jury: “the objection is sustained . . . [y]ou are not to consider the last response of the witness at this time as evidence.” Here, the similarity to the instruction in *Sheridan* is compelling. *See id.*, 263 N.C. App. at 705, 824 S.E.2d at 153. Therefore, we hold the trial court’s instruction to the jury cured any prejudice of Detective Smith’s testimony. Further, we must respect the presumption the jurors both understood and complied with those instructions. *See State v. Self*, 280 N.C. at 672, 187 S.E.2d at 97.

¶ 18 Detective Smith’s testimony was not prejudicial and the trial court’s instruction cured any prejudice to Defendant from that testimony. Accordingly, we hold the trial court did not abuse its discretion by denying the Defendant’s motion for a mistrial.

B. Ineffective Assistance of Counsel

¶ 19 [2] Defendant next argues that his counsel’s failure to challenge the photographic lineup’s compliance with the Eyewitness Identification Reform Act violated his Sixth Amendment right to effective assistance of counsel.

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1. Standard of Review

¶ 20 This Court reviews claims of the ineffective assistance of counsel (“IAC”) *de novo*. *State v. Fisher*, 318 N.C. 512, 531-34, 350 S.E.2d 334, 345-47 (1986). To establish a claim for IAC, a defendant first must prove counsel’s performance was “deficient,” meaning counsel functioned below an “objective standard of reasonableness” under prevailing professional norms. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006); *citing Strickland v. Washington*, 466 U.S. 668, 697-98, 104 S.Ct. 2052, 2069 (1984). Secondly, a defendant must prove the deficient performance prejudiced him, meaning there is a “reasonable probability that but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Allen* 360 N.C. at 316, 626 S.E.2d at 286 (*quoting Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068).

2. Discussion

¶ 21 Defendant argues counsel’s failure to challenge the photographic lineup’s compliance with the EIRA amounted to deficient performance. The EIRA requires photographic lineups to be administered by an “independent administrator,” meaning someone “who is not participating in the investigation . . . and is unaware of which person in the lineup is the suspect.” N.C. Gen. Stat. § 15A-284.52 (2019). Defendant argues that if a motion to suppress the photographic lineup had been filed, or if defense counsel challenged Detective Smith on cross-examination, this would have triggered the mandated jury instruction under N.C. Gen. Stat. § 15A-284.52(d)(3).

¶ 22 IAC claims are proper to address on direct appeal “when the cold record reveals that no further investigation is required.” *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 524 (2001). However, “claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (*citing State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)). Further, if certain evidentiary issues may need to be developed, this Court should dismiss the IAC claim without prejudice to Defendant’s right to reassert it in a Motion for Appropriate Relief. *See State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (“should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [Motion for Appropriate Relief] proceeding.”).

¶ 23 In this case, we cannot properly assess the IAC claim on direct appeal because there has been no evidentiary hearing on this issue, and

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the “cold record” is not dispositive. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) (concluding same); *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted) (Ineffective assistance of counsel claims “brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.”); *State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (declining to adjudicate ineffective assistance of counsel claim where record was silent as to whether defendant consented to his counsel’s argument regarding his guilt and determining that said issue was appropriately deferred for consideration in a motion for appropriate relief). Therefore, we dismiss Defendant’s IAC claim without prejudice to his right to file a Motion for Appropriate Relief in the trial court.

¶ 24 Should this issue be raised below in a Motion for Appropriate Relief, the trial court may “take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant’s allegations of ineffective assistance of counsel.” *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000).

V. Conclusion

¶ 25 We hold the trial court did not abuse its discretion in denying Defendant’s motion for a mistrial. The testimony of Detective Smith was not prejudicial to Defendant, and even if it was, the trial court’s instruction was curative. Moreover, we dismiss Defendant’s IAC claim without prejudice to his right to reassert the claim in a motion for appropriate relief.

NO PREJUDICIAL ERROR IN PART AND DISMISS IN PART.

Judge DIETZ concurs.

Judge MURPHY concurs in part and concurs in result only in part.

MURPHY, Judge, concurring in part and concurring in result only in part.

¶ 26 I cannot join with the Majority in its determination in Part IV(A)(2)(a), specifically that “Defendant was not prejudiced by the testimony [that his photo was available as part of the jail records].” *Supra* at ¶ 13.

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The testimony in this matter was of the same substance as the witness's testimony in *Aycoth* regarding "when [the defendant] was indicted for murder."¹ *State v. Aycoth*, 270 N.C. 270, 272, 154 S.E.2d 59, 60 (1967). "The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *Id.* (marks omitted). Similar to the improper testimony in *Aycoth*, the testimony informed the jury that Defendant had a criminal history of some sort. As a result, Defendant was prejudiced by this testimony.

¶ 27 However, as instructed by our Supreme Court in *Aycoth* and throughout our jurisprudence, as properly noted by the Majority, "Ordinarily where the evidence is withdrawn no error is committed. . . . Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case." *Id.* at 272-273, 154 S.E.2d at 61 (citations omitted); *see supra* at ¶ 16. While I do not join the Majority in holding Defendant was not prejudiced by this testimony, I do join the Majority in its prejudice analysis in Part IV(A)(2)(b). *Supra* at ¶¶ 15-18. As a result, I concur in the result reached regarding the trial court's denial of Defendant's motion for a mistrial. I otherwise join the Majority's opinion in full.

1. The Majority mistakenly refers to the defendant in *Aycoth* having been "arrested for murder," rather than having been "indicted for murder." *Supra* at ¶¶ 11, 12; *State v. Aycoth*, 270 N.C. 270, 272, 154 S.E.2d 59, 60 (1967). Admittedly, the testimony in *Aycoth* regarding an arrest may be referring to the indicted murder, but the recitation of the testimony leaves this ambiguous. *See id.*

STATE v. McLYMORE

[279 N.C. App. 34, 2021-NCCOA-425]

STATE OF NORTH CAROLINA

v.

DEMERY BERNARD McLYMORE

No. COA20-555

Filed 17 August 2021

Criminal Law—jury instructions—robbery with a dangerous weapon—no designation of victims named in indictment

The trial court did not err, much less commit plain error, by instructing the jury on the elements of robbery with a dangerous weapon without naming the two individuals listed in the indictment as the alleged victims. The evidence supported the elements of the offense with regard to at least one of the two named victims, both of whom testified at trial and identified defendant in court, and did not support a verdict of guilty to robbery with a firearm with regard to any other person who defendant interacted with during his crime spree.

Appeal by Defendant from judgment entered 23 October 2019 by Judge Michael A. Stone in Sampson County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant-Appellant.

COLLINS, Judge.

¶ 1

Defendant Demery Bernard McLymore appeals from judgment entered upon a jury verdict of guilty of one count of robbery with a dangerous weapon. Defendant argues that the trial court plainly erred by failing to designate in the robbery with a firearm¹ jury instruction the two

1. Where an individual is charged with robbery with a dangerous weapon and the alleged dangerous weapon is a firearm, the jury is instructed with North Carolina Pattern Jury Instruction 217.20, robbery with a firearm. Where an individual is charged with robbery with a dangerous weapon, and the alleged dangerous weapon is something other than a firearm, the jury is instructed with North Carolina Pattern Jury Instruction 217.30, robbery with a dangerous weapon – other than a firearm. We will refer to the charge in this case as robbery with a dangerous weapon and the jury instruction as robbery with a firearm.

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individuals named in the indictment as the alleged victims, allowing the jury to convict Defendant of an offense unsupported by the indictment. We discern no error and accordingly, no plain error.

I. Factual and Procedural Background

¶ 2 On 13 March 2017, Defendant was indicted for robbery with a dangerous weapon; the indictment named Elijah Bryant and Shalik Generette as the victims.² After a jury trial, the jury returned its verdict on 23 October 2019, finding Defendant guilty of robbery with a dangerous weapon. That same day, the trial court entered judgment on the verdict and sentenced Defendant to 128-166 months in prison. Defendant gave proper oral notice of appeal in open court.

¶ 3 The evidence presented a trial tended to show the following: On 3 September 2016, around 7:00 PM, Yvette Spinks was walking towards the Sampson Homes housing complex in Clinton, North Carolina. Defendant approached Yvette, pulled out a handgun and waved it towards her, and said, “give me what you’ve got.” Yvette did not have anything on her, and Defendant did not take anything from her.

¶ 4 Later that evening, at approximately 9:00 PM, Tevin Bryant and Desean McLean stopped at a convenience store in Clinton. Tevin remained in the truck and Desean went inside the store. Defendant approached the truck and asked Tevin for a ride to his girlfriend’s residence in the Sampson Homes housing complex. Desean returned to the truck and agreed to give Defendant a ride. Defendant got into the back seat where Desean had a loaded shotgun.

¶ 5 Upon arriving at Sampson Homes, Defendant got out of the truck but claimed that he had lost his pistol somewhere inside the truck. As Tevin and Desean helped Defendant look for his pistol, Defendant grabbed Desean’s shotgun from the back seat. Defendant threatened to kill Desean unless Tevin followed him, and Defendant told Tevin to “[s]hut up for I kill you.”

¶ 6 Defendant forced Tevin to walk with him. When they approached two boys, Elijah Bryant and Shalik Generette, Defendant stated, “Y’all going to need to stop walking or we going to blow your back out.” Defendant told Tevin to search Elijah and Shalik, and stated that he would kill Tevin and the boys if they did not obey. Defendant and Tevin searched the boys’ pockets and wrists, and Defendant took approximately \$40.00 and

2. A second count of robbery with a dangerous weapon naming a different victim was dismissed prior to trial.

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a pocketknife from Elijah. After taking the money and knife from Elijah, Defendant and Tevin ran away; the boys ran to a relative's home to call the police.

¶ 7 That same evening, around 11:00 PM, Sergeant Matthew Bland of the Clinton Police Department arrived at Sampson Homes “in reference to a female being assaulted at that time.” Bland discovered that the incident involved Yvette and he “made contact with [Yvette] to find out what had occurred.” Bland then saw a man walking away from him at a quick pace while “carrying what appeared to be a shotgun[.]”

¶ 8 Bland's search for the man carrying the shotgun led him to a nearby residence, which he obtained permission to search. Bland found Defendant in one of the bedrooms. When Bland searched Defendant, he found a little more than \$32, a pocketknife, a red and gold shotgun shell, a watch, and unspent bullets which could be used in a handgun. A short time later, Bland recovered a pump shotgun from the residence's backyard. Defendant was arrested and taken into custody. A few hours later, in the early morning hours of 4 September 2016, Bland interviewed Elijah and Shalik. Both boys provided descriptions of the man who had held them at gunpoint. Both descriptions matched Defendant.

II. Discussion

A. Standard of Review

¶ 9 As a threshold matter, the State argues that Defendant waived his right to all appellate review of the jury instruction because Defendant “did not object at trial to the armed robbery instruction despite at least three opportunities to do so,” “consented to the form of the instruction,” and “invited the error he complains of[.]” This argument has been rejected by our appellate courts under similar factual circumstances.

¶ 10 In *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254 (2018), “[t]he State argue[d] that defendant [wa]s precluded from plain error review in part under the invited-error doctrine because he failed to object, actively participated in crafting the challenged instruction, and affirmed it was ‘fine.’” *Id.* at 311, 813 S.E.2d at 259. Concluding that defendant's argument was reviewable for plain error, this Court explained:

Even where the “trial court gave [a] defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time [the] defendant indicated his satisfaction with the trial court's instructions,” our Supreme Court has not

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found the defendant invited his alleged instructional error but applied plain error review.

Id. (citing *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (alterations in original)).

¶ 11 Similarly, in *State v. Hardy*, 353 N.C. 122, 540 S.E.2d 334 (2000), our North Carolina Supreme Court explained that the defendant

had ample opportunity to object to the instruction outside the presence of the jury. After excusing the jury to the deliberation room, the trial court asked, “Prior to sending back the verdict sheets does the State wish to point out any errors or omissions from the charge?” The trial court then asked the same of defendant, and defendant responded with respect to other issues but did not object to the instruction in question. . . . As defendant failed to preserve this issue by objecting during trial, we will review the record to determine if the instruction constituted plain error.

Id. at 131, 540 S.E.2d at 342 (citing *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990); *State v. Morgan*, 315 N.C. 626, 644, 340 S.E.2d 84, 95 (1986)).

¶ 12 The transcript indicates the following: (1) Defendant replied “Yes, sir[,]” when the trial court asked if he was satisfied with using the pattern jury instruction for armed robbery; (2) Defendant replied “No, sir[,]” when the trial court asked if he had “[a]ny additions, corrections, or deletions to the instructions”; and (3) Defendant declined to be heard when the trial court determined it would not include the victims’ names when providing the pattern jury instruction.

¶ 13 As in *Harding* and *Hardy*, Defendant had the opportunity to object to the jury instruction, but he failed to do so. On appeal, Defendant “specifically and distinctly” contends the jury instruction amounted to plain error. N.C. R. App. P. 10(a)(4). Thus, we review the record to determine if the instruction constituted plain error. The plain error rule

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a “fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,” or “where [the error] is grave error which amounts to a denial of a fundamental right of the

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accused,” or the error has “‘resulted in a miscarriage of justice or in the denial to appellant of a fair trial’ “ or where the error is such as to “seriously affect the fairness, integrity or public reputation of judicial proceedings” or where it can be fairly said “the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.”

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

B. Analysis

¶ 14 Defendant argues that the trial court plainly erred by failing to designate in the jury instruction the two individuals named in the indictment as the alleged victims of the armed robbery, thereby allowing the jury to convict Defendant of an offense unsupported by the indictment. Defendant specifically argues that by failing to designate Elijah and Shalik in the jury instruction, “the jury was free to convict based on the uncharged robbery of Tevin[] and Desean[], or potentially even the attempted robbery of Yvette[].”

¶ 15 Where an indictment for robbery with a dangerous weapon alleges two victims in the conjunctive, the defendant’s guilt of the offense would be established with proof beyond a reasonable doubt that he robbed either victim – “the State [is] not required to prove both individuals had been robbed by defendant.” *State v. Ingram*, 160 N.C. App. 224, 226, 585 S.E.2d 253, 255 (2003) (citing *State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992) (stating “the use of a conjunctive in [a robbery with a dangerous weapon] indictment does not require the State to prove various alternative matters alleged”) (alteration in original)).

¶ 16 Here, the trial court instructed the jury on the crime of robbery with a firearm, consistent with North Carolina Pattern Jury Instruction 217.20, as follows:

The defendant has been charged with robbery with a firearm, which is taking and carrying away the personal property of another from his or her person or in his or her presence without his or her consent by endangering or threatening a person’s life with firearm, the taker knowing that he was not entitled to take the property, and intending to deprive another of its use permanently. For you to find the defendant guilty of this offense, the State must prove seven

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things beyond a reasonable doubt: First, that the defendant took property from the person of another or in the person's presence.

Second, that the defendant carried away the property.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the defendant knew that the defendant was not entitled to take the property.

Fifth, that at the time of taking, the defendant intended to deprive that person of its use permanently.

Sixth, that the defendant had a firearm in defendant's possession at the time defendant obtained the property.

Seventh, that defendant obtained the property by endangering or threatening the life of another person with the firearm.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant had, in defendant's possession, a firearm and took and carried away property from the person or presence of a person without that person's voluntary consent by endangering or threatening another person's life with the use or threatened use of a firearm, the defendant knowing that the defendant was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of any of these things, it would be your duty to return a verdict of not guilty.

¶ 17

Both Elijah and Shalik testified at trial. Shalik testified that Defendant and Tevin "placed a gun in [his and Elijah's] chests" while they searched both boys' pockets and wrists. Shalik identified Defendant in court and stated that Defendant had a "black, pump shotgun with red and gold bullets in it" and that he could see the bullets because Defendant cocked the gun and spilled some of the shells onto the ground. As Defendant pointed the gun at the boys and demanded they move to the middle of an

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alley, he told the boys to strip down to their underwear and he continued to search them.

¶ 18 Elijah’s testimony echoed Shalik’s. Elijah identified Defendant in court and stated that Defendant came up to him and pointed a black shotgun, containing red and gold bullets, at his head and chest. Elijah testified that Defendant loaded the red and gold shells into the shotgun, before he pointed it at both boys and threatened to kill them. Defendant then made Elijah and Shalik take off their clothes, before taking approximately \$40 from Elijah’s pockets. Defendant told Tevin “what to do” and made Tevin “start getting the change and stuff out of [Elijah’s and Shalik’s] pockets.” The State introduced into evidence the shotgun; six unspent shotgun shells; police interviews with Elijah and Shalik, wherein both boys identified the shotgun and shells used during the robbery; and the money taken during the robbery. This evidence was sufficient to support the jury instruction given.

¶ 19 Defendant argues that as a result of the robbery with a firearm instruction given, “the jury was free to convict based on the uncharged robbery of Tevin[] and Desean[.]” However, robbery with a firearm has additional elements to those of robbery, and the trial court neither instructed the jury on robbery nor included “guilty of robbery” as a potential verdict on the verdict sheet.

¶ 20 Moreover, the evidence as to Tevin and Desean did not support a verdict of guilty to robbery with a firearm. As the trial court instructed, robbery with a firearm requires “that the defendant had a firearm in defendant’s possession at the time defendant obtained the property[,]” and “that defendant obtained the property by endangering or threatening the life of another person with the firearm.” The evidence presented at trial did not show that Defendant had Desean’s shotgun in Defendant’s possession at the time Defendant obtained the shotgun. Moreover, Defendant claimed that he had lost his pistol somewhere inside the truck, and the evidence did not, and could not, show that Defendant had the pistol in his possession at the time Defendant obtained Desean’s shotgun or that Defendant threatened the life Tevin and/or Desean with the pistol.

¶ 21 Defendant similarly argues that as a result of the robbery with a firearm instruction given, “the jury was free to convict based on . . . potentially even the attempted robbery of Yvette[.]” However, robbery with a firearm has additional elements to those of attempted robbery, and the trial court neither instructed the jury on attempted robbery nor included “guilty of attempted robbery” as a potential verdict on the verdict sheet.

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¶ 22 Moreover, the evidence as to Yvette did not support a verdict of guilty to robbery with a firearm. As the trial court instructed, robbery with a firearm requires “that the defendant took property from the person of another or in the person’s presence” and “that the defendant carried away the property.” The evidence showed that Yvette did not have anything on her and that Defendant did not take anything from her.

¶ 23 The trial court’s instruction on robbery with a firearm properly constrained the jury’s consideration to the robbery with a dangerous weapon charged in the indictment, comported with the evidence presented at trial, and comported with the verdict sheet presented to the jury. We presume the jury followed the instructions. *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 (2002). Although it is better practice to designate in the robbery with a firearm jury instruction the individual(s) named in the indictment as the alleged victim(s), the trial court did not err in the robbery with a firearm instruction. We need not reach Defendant’s argument that Defendant was prejudiced by the trial court’s instructional error.

III. Conclusion

¶ 24 The trial court did not err, much less plainly err, in its robbery with a firearm jury instruction by not designating the victims named in the indictment as the alleged victims of the armed robbery.

NO ERROR.

Chief Judge STROUD and Judge WOOD concur.

STATE v. NEWBORN

[279 N.C. App. 42, 2021-NCCOA-426]

STATE OF NORTH CAROLINA

v.

CORDERO DEON NEWBORN, DEFENDANT

No. COA20-411

Filed 17 August 2021

1. Indictment and Information—single indictment—possession of firearm by felon—two other charges—fatally defective

Where the indictment charging defendant with possession of a firearm by a felon also included two other offenses, the indictment was fatally defective because it violated N.C.G.S. § 14-415.1(c), which requires a separate indictment for possession of a firearm by a felon.

2. Search and Seizure—motion to suppress—plain view doctrine—accessibility of firearm—material conflict in evidence

The trial court made insufficient findings to support a probable cause determination when it denied defendant's motion to suppress a firearm that was seized during a traffic stop where the court failed to resolve conflicting evidence about whether the firearm was readily accessible to defendant. Under the plain view doctrine—applicable here because the officer initially had probable cause to search defendant's car only for marijuana, but then inadvertently discovered the existence of a firearm in the center console by feeling and seeing the gun's handgrip—the officer could seize the firearm, which required removing the center console panel and therefore constituted a separate search, only if it was readily apparent that the firearm was evidence of a crime (carrying a concealed weapon). The matter was remanded for further findings of fact.

Appeal by Defendant from judgment entered 25 October 2019 by Judge Thomas H. Lock in Haywood County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Jarrett McGowan, for the State.

Joseph P. Lattimore for defendant-appellant.

MURPHY, Judge.

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¶ 1 When the charge of possession of a firearm by a felon is brought in an indictment containing other related offenses, the indictment for that charge is rendered fatally defective and invalid, thereby depriving a trial court of jurisdiction over it. *See State v. Wilkins*, 225 N.C. App. 492, 497, 737 S.E.2d 791, 794 (2013). When a trial court makes a conclusion of law while denying a motion to suppress, it must do so with the support of adequate findings of fact that resolve any material conflicts presented by the evidence.

¶ 2 Defendant was charged with possession of a firearm by a felon and two related offenses in a single indictment. The State's failure to obtain a separate indictment for the charge rendered it fatally defective and invalid, and did not invoke the trial court's jurisdiction. According to binding caselaw, we vacate Defendant's conviction for possession of a firearm by a felon.

¶ 3 Additionally, the trial court's ruling on Defendant's *Motion to Suppress* was based on improper findings of fact regarding a material conflict in the evidence of the firearm's accessibility. Given the absence of appropriate findings of fact pertaining to this material conflict, the trial court improperly concluded that the firearm was readily accessible so as to objectively create probable cause that it was evidence of a crime. We therefore remand this matter with instructions for the trial court to make adequate findings of fact resolving the material conflict regarding the firearm's accessibility presented by Defendant's *Motion to Suppress*.

¶ 4 Finally, because the trial court's findings on remand will directly impact the validity of Defendant's non-vacated convictions, Defendant's third issue on appeal regarding the trial court's omission of an actual knowledge requirement from its jury instruction on possession of a firearm with an altered/removed serial number, and related ineffective assistance of counsel claim, are not yet ripe for our consideration and are therefore dismissed without prejudice.

BACKGROUND

¶ 5 At approximately 11:30 p.m. on 25 April 2018 in Maggie Valley, an on-duty patrol officer, Sergeant Ryan Flowers, ran the registration plate of a vehicle driving on U.S. Highway 19 through his patrol vehicle's mobile data terminal ("MDT"). The MDT indicated that Defendant Cordero Deon Newborn was the registered owner of the vehicle and had a permanently revoked driver's license. Based on this information, Sgt. Flowers pursued the vehicle and checked the MDT for pending criminal cases, which reflected Defendant had four counts of misdemeanor

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driving while license revoked-not impaired revocation cases pending. After catching up with the vehicle, Sgt. Flowers initiated a traffic stop.

¶ 6 Sgt. Flowers verified Defendant was the driver of the vehicle. Immediately upon interacting with Defendant and his passenger, Samuel Nathaniel Angram, III, Sgt. Flowers identified the smell of marijuana emanating from the vehicle. When he inquired about the odor, Angram reportedly stated “[t]here’s none in here, man. I just smoked a little in the car a while ago.” Citing “probable cause . . . [to] believe [] marijuana was located in the vehicle” based on the odor and Angram’s admission, Sgt. Flowers decided to conduct a search of the vehicle, and called for backup.

¶ 7 Sergeant Jeff Mackey arrived on the scene. Angram indicated to Sgt. Mackey that there was a firearm underneath the passenger seat, which Sgt. Mackey located. While searching the driver’s side of the vehicle—where the smell of marijuana was reportedly most pungent—Sgt. Flowers felt and visually identified the handgrip of a pistol between the vehicle’s center console panel and carpeting, and placed Defendant under arrest for carrying a concealed weapon in violation of N.C.G.S. § 14-269(a). Sgt. Flowers then removed the vehicle’s plastic center console panel from the center and retrieved the firearm—a loaded, .45-caliber semiautomatic handgun that was missing a serial number on its frame and barrel.¹

¶ 8 On 6 August 2018, Defendant was indicted for possession of a firearm by a felon in violation of N.C.G.S. § 14-415.1; possession of a firearm with an altered/removed serial number in violation of N.C.G.S. § 14-160.2(b); and carrying a concealed weapon in violation of N.C.G.S. § 14-269(a). In a separate indictment, Defendant was charged with attaining habitual felon status as defined by N.C.G.S. § 14-7.1.

¶ 9 On 11 March 2019, Defendant filed a pretrial *Motion to Suppress* any evidence seized during the traffic stop. The motion was heard and denied on 22 October 2019, after the trial court found that Sgt. Flowers described the firearm as “readily accessible.” However, the trial court made no findings as to the firearm’s readily accessible location. At trial, Defendant did not raise a renewed objection when materials pertaining to the firearm seized from the center console area were introduced and admitted into evidence.

1. While Sgt. Flowers testified that he could not “recall whether [it was] on the roadside or after [he] transported [Defendant] to the detention facility[.]” his testimony established that at some point after he retrieved the firearm from the vehicle’s center console area, he discovered that Defendant was a convicted felon.

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¶ 10 The jury found Defendant guilty of possession of a firearm by a felon, possession of a firearm with an altered/removed serial number, and carrying a concealed weapon. As a result of the guilty verdicts, Defendant pled guilty to attaining habitual felon status.² On 25 October 2019, the trial court entered judgment, and Defendant provided oral notice of appeal.

¶ 11 Defendant raises three issues on appeal: (A) the trial court lacked jurisdiction over the charge of possession of a firearm by a felon because it was not contained in a separate indictment as required by the governing statute; (B) the trial court plainly erred in denying Defendant's pre-trial *Motion to Suppress*; and (C) the trial court plainly erred by failing to instruct the jury on the requirement of actual knowledge as an element of the offense of possession of a firearm with an altered/removed serial number.

ANALYSIS**A. Indictment for Possession of a Firearm by a Felon**

¶ 12 [1] “We review the sufficiency of an indictment *de novo*.” *Wilkins*, 225 N.C. App. at 495, 737 S.E.2d at 793. While Defendant failed to challenge his indictment for the charge of possession of a firearm by a felon at the trial court, “where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498, *reh’g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2000).

¶ 13 N.C.G.S. § 14-415.1(c) dictates “[t]he indictment charging [a] defendant [with possession of a firearm by a felon] shall be separate from any indictment charging him with other offenses related to or giving rise to [that] charge[.]” N.C.G.S. § 14-415.1(c) (2019).

¶ 14 Defendant’s charge of possession of a firearm by a felon was contained in a single indictment with two other charges: possession of a firearm with an altered/removed serial number and carrying a concealed weapon. Defendant quotes N.C.G.S. § 14-415.1(c) and asserts these

2. Defendant also pled guilty to a Class 3 misdemeanor of driving while license revoked-not an impaired revocation, but does not make any argument pertaining to that offense on appeal. His appeal of that conviction is therefore deemed abandoned. *See State v. Harris*, 21 N.C. App. 550, 551, 204 S.E.2d 914, 915 (1974) (stating that issues “not set out in [an] appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned”); N.C. R. App. P. 28(b)(6) (2021).

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charges are “relate[d] to or giv[e] rise to” the possession of a firearm by a felon charge, given that all three charges pertain to the same weapon and arose from the same search. In support of his contention, Defendant cites *Wilkins*, where we held the language of N.C.G.S. § 14-415.1(c) “mandates that a charge of [p]ossession of a [f]irearm by a [f]elon be brought in a separate indictment from charges related to it[.]” *Wilkins*, 225 N.C. App. at 497, 737 S.E.2d at 794.

¶ 15 In *Wilkins*, the defendant was indicted for possession of a firearm by a felon and assault with a deadly weapon. *Id.* at 493, 737 S.E.2d at 793. Both charges were listed in the same indictment, referred to the same weapon, and arose from the same incident—the defendant’s use of a firearm during a robbery. *Id.* at 496, 737 S.E.2d at 794. Giving “effect to the intent of the legislature as expressed in the statute’s plain language[.]” we concluded the State’s failure to obtain a separate indictment for that charge rendered it “fatally defective, and thus invalid.” *Id.* at 497, 737 S.E.2d at 794. As a result, we held the trial court lacked jurisdiction over the charge of possession of a firearm by a felon, and vacated the defendant’s conviction for the offense. *Id.*

¶ 16 In response to Defendant’s arguments regarding the separate indictment requirement, the State urges that *Wilkins*, and any cases consistent with it, must be read in light of *State v. Brice*, where our Supreme Court addressed a special indictment provision contained in N.C.G.S. § 15A-928(b). *State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017). N.C.G.S. § 15A-928(b) requires, *inter alia*, that “[a]n indictment or information for the offense must be accompanied by a special indictment” N.C.G.S. § 15A-928(b) (2019). In *Brice*, our Supreme Court noted that while the special indictment provision was “couched in mandatory terms, that fact, standing alone, does not make them jurisdictional in nature.” *Brice*, 370 N.C. at 253, 806 S.E.2d at 38. After “a careful examination of the language . . . , coupled with an analysis of the purposes sought to be served[.]” our Supreme Court ultimately concluded that the special indictment provision in N.C.G.S. § 15A-928(b) was not jurisdictional in nature, and as a result, the defendant could not challenge an indictment’s failure to comply with that special indictment provision for the first time on appeal. *Id.* The State argues we should apply this same reasoning to the present case to conclude that the separate indictment provision contained in N.C.G.S. § 14-415.1(c) does not constitute a jurisdictional requirement, and consequently, Defendant’s challenge to the indictment has been waived because he raised it for the first time on appeal.

¶ 17 However, we must follow the well-established principle that “[w]here a panel of the Court of Appeals has decided *the same issue* . . .

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a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (emphasis added). Our Supreme Court’s decision in *Brice* pertained to a special indictment provision in a completely different statute, while our decision in *Wilkins* concerned the same issue posed in the present case by Defendant: the separate indictment provision in N.C.G.S. § 14-415.1(c).

¶ 18 Consistent with our decision in *Wilkins*, we hold the State’s failure to obtain a separate indictment for the offense of possession of a firearm by a felon, as mandated by N.C.G.S. § 14-415.1(c), rendered the indictment fatally defective and invalid as to that charge. Accordingly, the trial court lacked jurisdiction over the charge of possession of a firearm by a felon. *See Wilkins*, 225 N.C. App. at 497, 737 S.E.2d at 794. Defendant’s conviction for possession of a firearm by a felon in violation of N.C.G.S. § 14-415.1 is vacated.

B. Motion to Suppress

¶ 19 [2] Defendant also challenges the trial court’s denial of his pretrial *Motion to Suppress*, and subsequent admission of the firearm seized from the center console of his vehicle into evidence at trial, on the grounds that the firearm was retrieved through an unreasonable search and seizure in violation of the United States and North Carolina constitutions. *See Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (holding the Fourth Amendment of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment), *reh’g denied*, 368 U.S. 871, 7 L. Ed. 2d 72 (1961); *State v. Garner*, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992) (“Article I, Section 20 of [the North Carolina] Constitution, like the Fourth Amendment to the United States Constitution, prohibits unreasonable searches and seizures[.]”). After addressing whether Defendant properly preserved this matter for appellate review, we examine whether the trial court’s *Order Denying Defendant’s Motion to Suppress Evidence* made adequate findings of fact pertaining to the material conflict of the accessibility of the firearm seized from the center console area.

1. Preservation

¶ 20 Defendant filed a pretrial *Motion to Suppress* items seized during the 25 April 2018 search of his vehicle, which the trial court denied. However, Defendant failed to raise a renewed objection at trial when the State introduced the seized firearm, and photographs of it, into evidence. Accordingly, the issue was not properly preserved for appellate review. *See State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232

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(2000) (citation omitted) (“A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial.”), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

¶ 21 However, Defendant “specifically and distinctly” argues on appeal that the trial court’s denial of his motion, and subsequent admission of the firearm into evidence, amounted to plain error. *See State v. Waring*, 364 N.C. 443, 508, 701 S.E.2d 615, 655 (2010) (marks omitted) (“In criminal cases, a question which was not preserved by objection nevertheless may be made the basis of an [appeal] where the judicial action questioned is specifically and distinctly contended to amount to plain error.”), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011); *see also* N.C. R. App. P. 10(a)(4) (2021).

2. Plain Error

¶ 22 Our Supreme Court has held:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (marks and citations omitted). We “apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases.” *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (reiterating the plain error standard from *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

¶ 23 “In conducting our review for plain error, we must first determine whether the trial court did, in fact, err in denying Defendant’s motion to suppress.” *State v. Powell*, 253 N.C. App. 590, 594, 595, 800 S.E.2d 745, 748-49 (2017) (noting that, in a plain error analysis regarding the denial of a motion to suppress, we apply the normal standard of review to determine whether error occurred).

¶ 24 “The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the conclusions of law.”

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State v. Jackson, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176, *disc. rev. denied*, 369 N.C. 190, 793 S.E.2d 694 (2016).

a. Findings of Fact

¶ 25 Defendant argues that the trial court made erroneous findings of fact in its *Order Denying Defendant’s Motion to Suppress Evidence*, specifically contending that Findings of Fact 23 and 25 were not supported by competent evidence. Finding of Fact 23 states:

23. That afterwards, [Sgt.] Flowers re-approached Defendant and asked him if there were any other firearms in the vehicle, to which Defendant replied there were not. [Sgt.] Flowers then began to search the vehicle. He concentrated on the front driver’s side floorboard and center console area because that is where the odor of marijuana smelled strongest to him.

The finding immediately preceding Finding of Fact 23 pertained to Sgt. Mackey’s discovery of the first firearm underneath the vehicle’s passenger seat. Defendant claims Finding of Fact 23 inaccurately states that Sgt. Flowers began searching the center console area of the vehicle immediately after Sgt. Mackey’s discovery of the first firearm, when Sgt. Mackey’s testimony established both he and Sgt. Flowers conducted individual searches that bore no fruit prior to the search referenced in Finding of Fact 23.

¶ 26 However, the testimony Defendant references, where Sgt. Mackey stated “I searched it once; he searched it once because he started on the driver’s side and I started on the passenger side[,]” does not establish a clear timeline for these searches. This testimony could be reasonably construed to indicate these initial searches occurred prior to, or concurrently with, the search of the center console area by Sgt. Flowers referenced in Finding of Fact 23. Further, the language “[t]hat afterwards” merely indicates that Sgt. Flowers’ discovery of a firearm on the driver’s side of the vehicle occurred after Sgt. Mackey’s discovery of a firearm underneath the passenger seat. This general timeline was not disputed and is corroborated by Defendant’s own challenge on appeal.

¶ 27 Sgt. Mackey’s testimony was “evidence that a reasonable mind might accept as adequate to support the finding” that Sgt. Flowers searched the driver’s side of the vehicle and located a firearm in the center con-

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sole area after Sgt. Mackey discovered a firearm underneath the passenger seat. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176. Finding of Fact 23 does not constitute an erroneous finding of fact.

¶ 28 Defendant also argues that Finding of Fact 25 was not supported by competent evidence. Finding of Fact 25 states:

25. That [Sgt.] Flowers then removed the driver's side, plastic center console panel from the center console. It took some effort, but *no tools were needed*. He located a Kahr model CW45 .45-caliber semi-automatic handgun in a natural void behind the panel.

(Emphasis added). Defendant challenges this finding of fact for “significantly downplay[ing] [the] difficulty [Sgt. Flowers had] in removing the console[,]” and further alleges there was no evidence at the suppression hearing to substantiate the portion of the finding that states “no tools were needed.” We agree that this portion of Finding of Fact 25 regarding no need for tools was not supported by competent evidence.

¶ 29 At the hearing on Defendant's *Motion to Suppress*, Sgt. Flowers testified that the center console's plastic covering “[p]retty much” popped right off, but also confirmed he “had to get on [his] hands and knees . . . [to] pull [it] loose[.]” He admitted it “took a little work” to remove the plastic panel, and stated he did not recall whether the center console had screws, or how it came loose. However, no further testimony or evidence relating to tools was given at the suppression hearing. It was only after the hearing, at trial, that Sgt. Flowers testified that he did not require special tools to remove the panel.

¶ 30 “[T]he facts supporting the trial court's decision to grant or deny a defendant's suppression motion will be established *at the suppression hearing* on the basis of testimony given under oath.” *State v. Salinas*, 366 N.C. 119, 125-26, 729 S.E.2d 63, 68 (2012) (emphasis added) (marks omitted) (citing N.C.G.S. § 15A-977(d) (2011)). In reviewing the testimony presented at the hearing on Defendant's *Motion to Suppress*, there was no “evidence that a reasonable mind might accept as adequate to support the finding” that “no tools were needed” in Sgt. Flowers' removal of the center console panel. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176. Further, this portion of Finding of Fact 25 contradicts Sgt. Flowers' own testimony at the hearing on Defendant's *Motion to Suppress*, where he stated that he did not recall whether the panel had screws or how it came loose.

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¶ 31 Therefore, this challenged portion of Finding of Fact 25—“no tools were needed”—was unsupported by evidence presented at the *Motion to Suppress* hearing, and is not binding on appeal. See *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012).

b. Conclusions of Law and Denial of the Motion to Suppress

¶ 32 We next determine whether—in the absence or presence of the aforementioned portion of Finding of Fact 25 and the trial court’s other related finding of fact³—the trial court’s remaining findings of fact support its conclusions of law and denial of Defendant’s *Motion to Suppress*. In its order denying the motion, the trial court made the following conclusions of law:

3. . . . [Sgt.] Flowers had reasonable and articulable suspicion of criminal activity to justify a motor vehicle stop based upon the information which he received from his MDT regarding the registration and driver’s license information relating to [Defendant’s vehicle];

3. Though not referenced by Defendant in his challenge on appeal, we note that the trial court’s Finding of Fact 27, which states “on re-direct examination, [Sgt.] Flowers described the Kahr firearm as ‘readily accessible’ to someone who knew it was there, as he could feel it and see it without removing the panel[,]” cannot properly be considered as a finding of fact, as it reflects a mere recitation of testimony. See *In re: N.D.A.*, 373 N.C. 71, 75, 833 S.E.2d 768, 772 (2019) (marks omitted) (“We agree with the Court of Appeals that recitations of the testimony of [a] witness *do not* constitute *findings of fact* by the trial judge.”); *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983) (“Although . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts.”).

Our review must be “limited to those facts found by the trial court and the conclusions reached in reliance on those facts, *not* the testimony recited by the trial court in its order.” *State v. Derbyshire*, 228 N.C. App. 670, 679-80, 745 S.E.2d 886, 892-93 (2013) (emphasis added) (holding “mere recitation of testimony . . . is not sufficient to constitute a valid finding of fact”), *disc. rev. denied*, 367 N.C. 289, 753 S.E.2d 785 (2014). Accordingly, in determining whether the trial court made proper findings of fact as to the material conflict of the firearm’s accessibility, we limit our review to the trial court’s proper findings of fact. We further note that this recitation of Sgt. Flowers’ testimony regarding his subjective opinion as to the firearm’s accessibility, which the trial court erroneously designated as a finding of fact, cannot provide the objective probable cause necessary to conduct a warrantless search of the vehicle. See *State v. Burwell*, 256 N.C. App. 722, 733, 808 S.E.2d 583, 592 (2017) (citing *Devenpeck v. Alford*, 543 U.S. 146, 160 L. Ed. 2d 537 (2004)) (“[W]arrantless arrests are reasonable under the Fourth Amendment if there is objective probable cause to arrest for the violation of an offense.”), *disc. rev. denied, appeal dismissed*, 370 N.C. 569, 809 S.E.2d 873 (2018); see also *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) (“[F]or situations arising under [the North Carolina] Constitution, we hold that an objective standard, rather than a subjective standard, must be applied to determine the reasonableness of police action related to probable cause.”).

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4. That the positive identification of Defendant as the driver . . . justified further detainment[.]

5. That immediately after engaging Defendant in Defendant's vehicle, [Sgt.] Flowers developed probable cause to conduct a warrantless search of the [vehicle] due to the "relatively strong" odor of marijuana emanating from the interior of the vehicle, particularly after the passenger's admission that marijuana had just been smoked. . . .

6. That the discovery of the first firearm under the passenger's seat by [Sgt.] Mackey provided additional probable cause to search the vehicle, as it supported a second violation, to wit: Carrying a Concealed Weapon . . . , and more concealed weapons may have been present.

7. That [Sgt.] Flowers' decision to search the [vehicle] and the subsequent search thereof – including the scope of that search – was reasonably-based upon the totality of the circumstances, and such circumstances were sufficiently strong in and of themselves to establish probable cause for this search and the resulting arrest of Defendant for the charges of Possession of Firearm by Felon, Possession of a Firearm with Altered/Removed Serial Number, Carrying a Concealed Weapon, and Driving While License Revoked – Not Impaired Revocation.

8. That the stop, investigation, detention, and arrest of Defendant did not constitute a violation of the federal or state constitutions, and it was in compliance with the North Carolina Criminal Procedure Act contained in Chapter 15A of the North Carolina General Statutes.

Defendant argues the trial "court's conclusion that there was probable cause . . . was in conflict with the testimony of Sgt. Flowers."

¶ 33

Both the United States Constitution and our state constitution protect individuals from unreasonable searches and seizures, and evidence seized in violation of these constitutional protections must be suppressed. U.S. Const. amend. IV; N.C. Const. art. I, § 20; *see Garner*, 331 N.C. at 505-06, 417 S.E.2d at 510; *Mapp*, 367 U.S. at 655, 6 L. Ed. 2d at 1090.

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¶ 34 We note that Sgt. Flowers’ action of removing the center console constituted a separate search from the search for marijuana that was the lawful objective of his entry into the driver’s side of the vehicle. *See Arizona v. Hicks*, 480 U.S. 321, 324-25, 94 L. Ed. 2d 347, 353-54 (1987) (holding an officer’s “moving of [stereo] equipment . . . constitute[d] a [search] separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of [the police officer’s] entry into the apartment.”).

¶ 35 Merely inspecting the portion of the firearm that came into Sgt. Flowers’ view during the search for marijuana was not an independent search, as it did not produce an additional invasion of Defendant’s privacy interest. *See id.* at 325, 94 L. Ed. 2d at 354. However, “taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of [the vehicle’s] contents, did produce a new invasion of [Defendant’s] privacy unjustified by the exigent circumstance that validated the entry.” *Id.* The “distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment.” *Id.* (marks omitted).

¶ 36 Therefore, it must be determined whether this independent search of the console area was reasonable. The lack of a relationship between Sgt. Flowers’ search of the center console area and the initial entry to the vehicle does not render the search *ipso facto* unreasonable, as:

That lack of relationship *always* exists with regard to action validated under the plain view doctrine[.] . . . It would be absurd to say that an object could lawfully be seized and taken from the premises, but could not be moved for closer examination. It is clear, therefore, that the search here was valid if the plain view doctrine would have sustained a seizure of the [firearm]. . . . [I]n order to invoke the plain view doctrine[,]. . . probable cause [to believe the item was evidence of a crime] is required.

Id. at 325-26, 94 L. Ed. 2d at 354-55 (marks omitted).

¶ 37 “Objects which are in the plain view of a law enforcement officer who has the right to be in the position to have that view are subject to seizure and may be introduced into evidence.” *State v. Hunter*, 299 N.C. 29, 34, 261 S.E.2d 189, 193 (1980). Under the plain view doctrine:

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[P]olice may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) *it was immediately apparent to the police that the items observed were evidence of a crime* or contraband.

State v. Graves, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (emphasis added).

¶ 38 Defendant does not challenge whether the officers had the authority to enter his vehicle to search for marijuana. Thus, the first prong of the plain view doctrine is not at issue. Additionally, there was testimony at the *Motion to Suppress* hearing supporting that Sgt. Flowers' initial discovery of the firearm occurred inadvertently—while searching for marijuana and reaching in and around the vehicle's center console area—and Defendant does not challenge whether the discovery occurred inadvertently, so the second prong of the plain view doctrine is also not at issue.

¶ 39 However, Defendant contends that the seizure does not comply with the third prong of the plain view doctrine and argues that it was not “immediately apparent” to Sgt. Flowers that the handgrip of the firearm constituted evidence of the crime of carrying a concealed weapon because it was not within easy reach and readily accessible to Defendant.

¶ 40 “An item is immediately apparent under the plain view doctrine if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.” *State v. Haymond*, 203 N.C. App. 151, 162, 691 S.E.2d 108, 119 (marks omitted), *disc. rev. denied*, 364 N.C. 600, 704 S.E.2d 275 (2010). “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (marks omitted). “Probable cause exists where the facts and circumstances within [an] officer's knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed.” *Id.* (marks omitted).

¶ 41 “The essential elements of carrying a concealed weapon in violation of N.C.G.S. § 14-269(a) are: (1) [t]he accused must be off his own premises; (2) he must carry a deadly weapon; and (3) the weapon must be concealed about his person.” *State v. Hill*, 227 N.C. App. 371, 380, 741 S.E.2d 911, 918 (marks omitted), *disc. rev. denied, appeal dismissed*, 367 N.C. 223, 747 S.E.2d 577 (2013). The weapon does not necessarily need to be

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concealed “on the person of the accused, but in such a position as gives him *ready access to it*[.]” *Id.* at 381, 741 S.E.2d at 918 (emphasis added). The weapon must be “concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive.” *State v. Gainey*, 273 N.C. 620, 623, 160 S.E.2d 685, 687 (1968).

¶ 42 In his testimony at the *Motion to Suppress* hearing, Sgt. Flowers stated the firearm was “pretty hard to get to[.]” and confirmed he had to get on his hands and knees to remove the plastic covering of the center console. However, Sgt. Flowers also testified that he believed “if you knew [the firearm] was there, you could get it out just by prying the panels [loose] without breaking it all the way off.” He testified that he “could agree” with defense counsel that the firearm would not be readily accessible if the panel was not removed, but also said “[i]t could have been readily available. I did not have knowledge of how to pry that piece of material off. . . . I can’t confirm whether it’s easy or not easy to get to. I don’t own the vehicle.”

¶ 43 Based on this conflicting testimony, it is unclear what degree of difficulty Sgt. Flowers experienced in attempting to remove the center console panel. The contradictory evidence regarding this degree of difficulty is a material conflict requiring findings of fact, as establishing how difficult it was to remove the center console panel is a prerequisite to determining whether or not the firearm was “readily accessible” to create probable cause that the firearm constituted evidence of the crime of carrying a concealed weapon in violation of N.C.G.S. § 14-269(a).

¶ 44 The trial court’s *Order Denying Defendant’s Motion to Suppress Evidence* did not contain any findings of fact related to the degree of difficulty Sgt. Flowers had in removing the center console panel and retrieving the firearm. As a result, the trial court failed to make necessary findings to resolve a material conflict presented by the evidence during the *Motion to Suppress* hearing: whether the firearm was within Defendant’s “convenient control and easy reach, so that he could promptly use it,” such that there was probable cause to believe it constituted evidence of the crime of illegally carrying a concealed weapon. *See id.*

¶ 45 Without resolving this material conflict through adequate findings of fact, the trial court’s conclusions regarding probable cause are not supported. Further, without adequate findings of fact regarding the firearm’s accessibility, the trial court could not properly rule on Defendant’s *Motion to Suppress*.

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3. Necessary Findings on Remand

¶ 46 The trial court's failure to make necessary findings of fact prevents us from conducting meaningful appellate review of the material conflict presented by the evidence, and this error was capable of sufficiently prejudicing Defendant. *See State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984) ("Findings and conclusions are required in order that there may be a meaningful appellate review of the decision."). We must remand for the trial court to make adequate findings of fact resolving whether or not the firearm was "readily accessible" to Defendant such that it objectively created probable cause to believe it constituted evidence of illegally carrying a concealed weapon. In making this determination, the trial court's findings of fact must be limited to evidence adduced at the hearing on Defendant's *Motion to Suppress* and may not substitute later testimony or mere recitations of testimony at the *Motion to Suppress* hearing for findings of fact on the motion. *See Lang*, 309 N.C. at 520, 308 S.E.2d at 321 ("Although . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts.").

¶ 47 We therefore remand for further findings of fact consistent with this opinion.

**C. Instruction Regarding Actual Knowledge of
Serial Number Removal**

¶ 48 On remand, the determination of the firearm's accessibility will directly impact not only the validity of the trial court's order denying Defendant's suppression motion and Defendant's conviction for the non-vacated offense of carrying a concealed weapon, but also Defendant's conviction for possession of a firearm with an altered/removed serial number. Consequently, Defendant's third challenge raised on appeal pertaining to the trial court's jury instruction as to the charge of possession of a firearm with an altered/removed serial number, as well as his claim of ineffective assistance of counsel, are dismissed without prejudice as they are not yet ripe.

CONCLUSION

¶ 49 The trial court lacked jurisdiction over the charge of possession of a firearm by a felon due to the State's failure to obtain a separate indictment for that charge in compliance with N.C.G.S. § 14-415.1. Further, the trial court failed to make necessary findings of fact regarding the seized firearm's accessibility, this error was potentially sufficiently prejudicial to Defendant, and further findings of fact are needed to resolve the ma-

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terial conflict of the firearm's accessibility. In light of the impact these findings of fact may have on Defendant's remaining non-vacated convictions, Defendant's challenge to the trial court's jury instruction as to the charge of possession of a firearm with an altered/removed serial number, as well as his claim of ineffective assistance of counsel, are not yet ripe for our consideration.

VACATED IN PART; REMANDED FOR FURTHER FINDINGS IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges DIETZ and CARPENTER concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ROBERT LOUIS STATON, DEFENDANT

No. COA20-676

Filed 17 August 2021

Firearms and Other Weapons—discharging into an occupied vehicle while in operation—“into property” element—toolbox in truck bed

There was sufficient evidence to convict defendant of discharging a firearm into an occupied vehicle while in operation, in violation of N.C.G.S. § 14-34.1(b), where the “into property” element was satisfied by a bullet fired from defendant's gun striking the toolbox that was attached inside the bed of the victim's truck, adjacent to the wall of the truck's passenger cabin.

Appeal by Defendant from judgment entered 30 January 2020 by Judge Wayland Sermons in Martin County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Mark Hayes for Defendant.

GRIFFIN, Judge.

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¶ 1 Defendant Robert Louis Staton (“Defendant”) appeals from a conviction of discharging a firearm into an occupied vehicle while in operation. Defendant argues that the court erred by not dismissing the charge because the bullet hit the toolbox and not the truck. After review, we discern no error.

I. Factual and Procedural Background

¶ 2 On 3 December 2018, Defendant was indicted for (1) discharging a firearm into an occupied vehicle while in operation and (2) possession of a firearm by a felon. This charge arose from an incident where Defendant fired three shots at the pickup truck of Mr. John Griffin while both individuals were driving down the road.

¶ 3 At trial, Mr. Griffin testified that Defendant pulled onto the road behind him and accelerated until Defendant positioned his vehicle closely behind Mr. Griffin’s vehicle. Mr. Griffin stated that he saw Defendant stick his arm out the window of Defendant’s vehicle with a small caliber gun and fire three shots at Mr. Griffin’s pickup. Mr. Griffin immediately went to the police station and found no one present. He then went to the magistrate’s office. When Mr. Griffin arrived at the magistrate’s office, he saw one bullet hole in his toolbox. He testified that the hole came from the Defendant’s shots at his vehicle. The State offered into evidence photographs of Mr. Griffin’s truck, photographs of Mr. Griffin’s toolbox with a single hole from a gunshot, and a photograph of the bullet that was pulled from Mr. Griffin’s toolbox. Mr. Griffin testified that he was unaware of any damage to his toolbox prior to the interaction with Defendant.

¶ 4 Defendant made an initial motion to dismiss for insufficiency of the evidence at the close of the State’s evidence. That motion was denied. Defendant’s motion to dismiss for insufficiency of the evidence was renewed after all evidence had been entered and was again denied by the trial court judge.

¶ 5 On 30 January 2020, a jury found Defendant guilty of (1) discharging a firearm into an occupied vehicle while in operation and (2) possession of a firearm by a felon. Defendant timely appeals.

II. Analysis

¶ 6 Defendant appeals from a jury verdict finding Defendant guilty of discharging a firearm into an occupied vehicle while in operation, in violation of N.C. Gen. Stat. § 14-34.1(b). Defendant contends that the trial court erred by not granting Defendant’s motion to dismiss for lack of evidence. Defendant argues that under N.C. Gen. Stat. § 14-34.1(b),

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the bullet must, at a minimum, strike an exterior wall of the vehicle to be a violation of the statute. Defendant also argues that N.C. Gen. Stat. § 14-34.1(b) was not violated because the toolbox is not included as part of the truck for the purposes of the statute. We disagree.

¶ 7 Defendant properly preserved the denial of the motion to dismiss for insufficiency of the evidence for appeal at the trial court level. *See* N.C. R. App. P. 10(a)(3) (stating a party who wishes to preserve for appeal a motion to dismiss for insufficiency of the evidence must make a motion to dismiss at the close of the State’s evidence and again at the close of all evidence).

A. Standard of Review

¶ 8 “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of the offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. The Motion to Dismiss

¶ 9 The trial court did not err in denying Defendant’s motion to dismiss. The evidence, when viewed in the light most favorable to the State, substantially showed that each element of N.C. Gen. Stat. § 14-34.1(b) had been met and that Defendant was the perpetrator.

¶ 10 N.C. Gen. Stat. § 14-34.1(b) requires a defendant to “(1) willfully and wantonly discharg[e] (2) a firearm (3) into property (4) while it is occupied.” *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995). The “into property” element includes any “building, structure, vehicle, aircraft, or other conveyance, device, equipment, erection, or enclosure[.]” N.C. Gen. Stat. § 14-34.1(a) (2019).

¶ 11 Defendant does not contest the sufficiency of the State’s evidence as to the elements of willfully and wantonly discharging a firearm or that

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the vehicle was occupied. Defendant only argues that the State failed to prove that any shot went “into” the vehicle.

¶ 12 “[T]he ‘into [property]’ element is satisfied when [a] bullet[] damage[s] the exterior of a building, even though there is no evidence that the bullet[] penetrated to the interior.” *State v. Canady*, 191 N.C. App. 680, 689, 664 S.E.2d 380, 385 (2008) (citations omitted). Further, “[t]here is no requirement that the defendant have a specific intent to fire *into* the occupied building, only that he . . . (1) intentionally discharged the firearm *at* the occupied building with the bullet(s) entering the occupied building, or (2) intentionally discharged the firearm at a person with the bullet(s) entering an occupied building.” *Id.* at 686, 664 S.E.2d at 383-84 (citation omitted).

¶ 13 In *State v. Miles*, 223 N.C. App. 160, 733 S.E.2d 572 (2012), the defendant alleged that he had not violated N.C. Gen. Stat. § 14-34.1(b) when he discharged a firearm that struck a porch because the porch was not part of the house. *State v. Miles*, 223 N.C. App. 160, 161, 733 S.E.2d 572, 573 (2012). This Court found no error by the trial court in denying the defendant’s motion to dismiss pursuant to N.C. Gen. Stat. § 14-34.1(b). *Id.* at 160, 733 S.E.2d at 573. This Court reasoned that the porch fell into the meaning of “building” because it was attached to the house and shared many of the same activities as the home. The *Miles* Court employed a broad construction of N.C. Gen. Stat. § 14-34.1, applying the statute to “any building, structure . . . or other conveyance, device, equipment, erection, or enclosure”, and there was no reason to find that the porch was not part of the house, given the purpose of the statute. *Id.* at 163-64, 733 S.E.2d at 574-75. “The purpose of [N.C. Gen. Stat.] § 14-34.1 is to protect occupants of the building, vehicle, or other property, described in the statute.” *Id.* at 163, 733 S.E.2d at 575 (quoting *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988)).

¶ 14 Here, the “into [property]” element was satisfied when the bullet struck the truck’s toolbox. While the bullet did not enter the vehicle through a standard part of the vehicle, such as the tailgate or the door, the bullet did strike the exterior of the vehicle, via the toolbox. Similar to *Miles*, where this Court ruled that a bullet that struck the outside of a porch satisfied the “into [property]” element, a bullet striking a toolbox connected to an occupied vehicle is sufficient to satisfy the “into [property]” element. In *Miles*, the porch was attached to the exterior of the house and shared a common wall with the house. *Miles*, 223 N.C. App. at 163, 733 S.E.2d at 574. In the case before us, the toolbox was similarly fastened to the exterior of the truck and even sat inside the bed of the truck, adjacent to the wall of the truck’s passenger cabin.

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¶ 15 The legislative purpose of the statute is clear. The purpose of the statute is to protect the occupants of certain properties from being shot at. *Mancuso*, 321 N.C. at 468, 364 S.E.2d at 362. To hold that Defendant is not guilty would contradict the purpose of the statute and frustrate the intent of the legislature.

¶ 16 We agree with the trial court that the State met its burden to proceed to the jury on its theory that Defendant willfully discharged a firearm into an occupied vehicle while in operation. The bullet striking the toolbox of the vehicle is sufficient to meet the requirement of firing “into [property]”.

III. Conclusion

¶ 17 The trial court did not err in denying Defendant’s motion to dismiss the charge of discharging a firearm into an occupied vehicle while in operation.

NO ERROR.

Chief Judge STROUD and Judge HAMPSON concur.

MICHELLE PORTMAN WALTER, PLAINTIFF-APPELLEE
v.
JAMES MILTON WALTER, JR., DEFENDANT-APPELLANT

No. COA20-590

Filed 17 August 2021

1. Contempt—willful violation of order—ambiguous terms—reasonable interpretation

The trial court erred by finding a father in civil contempt for willful violation of a child custody and support consent order where the consent order was ambiguous as to the relevant issue (summer vacation), such that the father’s interpretation of the ambiguous provisions was reasonable.

2. Attorney Fees—civil contempt order—vacated—no legal basis for attorney fees

Where the trial court’s order holding a father in civil contempt for willful violation of a child custody and support consent order was vacated because the consent order was ambiguous as to the

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relevant issue (summer vacation), the portion of the order awarding attorney fees to the mother was also vacated because there was no legal basis for an award of attorney fees. This case did not present one of the limited situations in which attorney fees could still be awarded even though the alleged contemnor could not be held in contempt at the time of the hearing.

Appeal by defendant from order entered 20 February 2020 by Judge Laurie Hutchins in District Court, Forsyth County. Heard in the Court of Appeals 27 April 2021.

Morrow, Porter, Vermitsky & Taylor, PLLC, by John C. Vermitsky, for Plaintiff-Appellee.

Fox Rothschild LLP, by Michelle D. Connell, for Defendant-Appellant.

STROUD, Chief Judge.

¶ 1 James Milton Walter, Jr., (“Father”) appeals from a contempt order entered 20 February 2020 in which the trial court determined that Father had willfully violated a child-custody order and held Father in civil contempt. For the reasons discussed herein, we vacate.

I. Background

¶ 2 Michelle Portman Walter (“Mother”) and Father were married in 2000 and divorced in February 2016. The couple are the parents to two minor children during their marriage, “KLW” and “ELW.”¹

¶ 3 On 22 October 2015, Mother filed a complaint asserting claims for child custody, child support, post-separation support, alimony, attorney’s fees, equitable distribution, and absolute divorce. Father filed an answer and asserted counterclaims for child custody, child support, and equitable distribution on 28 December 2015. Mother replied and filed a motion for summary judgment divorce. Absolute divorce was granted on 1 February 2016.

¶ 4 On 11 March 2016, the district court entered a Consent Order for Child Custody and Child Support (the “Consent Order”). The Consent Order awarded joint legal custody to the parties, with primary legal custody to Father and secondary legal custody to Mother. The Consent

1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

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Order does not expressly award “physical custody” to either party and defines “joint legal custody” as follows:²

[J]oint legal custody shall mean that the parties shall discuss and mutually decide upon all major educational, religious, and medical decisions affecting or involving their minor children. Further, the minor children of the parties shall reside with [Father] and spend time with [Mother] as the parties mutually agree. In the event the parties cannot agree, the schedule shall be as follows

- a. The minor children shall reside with [Father], but spend time with [Mother] based on a two week schedule.
- b. Beginning on January__, 2016 [Mother] shall have the minor children on Tuesday or Thursday evenings for dinner from 5:30 p.m. until 7:30 p.m. [Mother] shall also have the minor children from Friday at 5:30 p.m. until Sunday at 5:30 p.m. The following week, [Mother] shall have the minor children for dinner on Thursday for dinner from 5:30 p.m. until 7:30 p.m. This two week schedule shall continue to repeat itself. The intent of this schedule is that [Mother] not have a seven day period without seeing the children, *absent vacations*. Thus if [Father] has the children for a weekend, [Mother] shall have the minor children the following Tuesday and Thursday for dinner.
- c. During the minor children’s weekday visits with [Mother], she shall ensure that they work on their homework to provide for an orderly evening and bedtime at [Father’s].
- d. Any other time agreed to by the parties;
- e. All exchanges shall occur with [Mother] retrieving and retuning the minor children to

2. In the Contempt Order, the trial court interpreted the Consent Order as providing “joint legal custody of the children between [M]other and [F]ather and primary physical custody for the [Father] . . . with the [M]other exercising secondary physical custody.” This is a reasonable description of the Consent Order but is not entirely accurate, as the Consent Order did not expressly award “physical custody” to either party.

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[Father] at the former marital residence, unless alternate arrangements are made.

f. In the event changes are needed to the regular visitation schedule provided for herein, arrangements will be made at least 48 hours in advance via e-mail or text and additional time or changes will be as mutually agreed upon. Both parties agree that neither the regular time sharing schedule nor the holiday time sharing schedule provided for herein will interfere significantly with the children's school attendance.

The Consent Order then sets out detailed provisions for holiday and summer visitation, which

shall supersede and take priority over the regular physical custody schedule of the said minor children as set out hereinabove. By mutual agreement, [Mother] and [Father] may alter these specific holiday dates, time periods, and other restrictions, and both parties agree to work together to arrange appropriate compromises when applicable regarding the following summer and holiday periods and with regard to the children attending summer camp and the like.

The Consent Order specifically sets out the schedule for Christmas, Thanksgiving, Spring Break, and summer vacation. As relevant to this appeal, the Consent Order states the following regarding summer vacation:

(e) Beginning in 2016, the [Father] shall have summer vacation with the minor children for *at least two non-consecutive weeks during each summer (school) vacation period of the minor children*, as said period is determined by the school the children are attending; however the parties recognize, in the event [Father] travels out of town with the minor children, he may need to have two consecutive weeks for the trip. *The [Father] shall give the [Mother] adequate, written notice of his proposed period of summer vacation for the upcoming summer period, (within 5 days of making the plans) including where he is traveling with the minor children. Beginning in 2016, the [Mother] shall have summer*

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vacation with the minor children for at least one week during each summer (school) vacation period of the minor children, as said period is determined by the school the children are attending. The [Mother] shall give the [Father] written notice on or before April 1st of each year of her proposed period of summer vacation for the upcoming summer period, so as to allow [Father] to plan the minor children's activities.

(Emphasis added.)

¶ 5 On 30 August 2019, Mother filed a motion to show cause why Father should not be held in both civil and criminal contempt of court for an alleged violation of the Consent Order. Mother alleged that Father had “willfully failed, refused and neglected to abide by the terms and provisions of [the Consent Order] . . . in that the [Father] ha[d] exercised [an] extra vacation week without the [Mother’s] agreement to changing the visitation schedule” after he had already “exercised his two non-consecutive weeks [with the children during their summer vacation].” The district court entered a show-cause order on the same day.

¶ 6 The hearing on civil contempt was held on 21 January 2020.³ On 20 February 2020, the district court entered an Order for Contempt (the “Contempt Order”) finding Father in civil contempt of the Consent Order. The Contempt Order states the following:

3. Defendant/Father has willfully violated the [Consent] [O]rder by his own unilateral decision in taking the children for an extra week of vacation against the wishes of Plaintiff/Mother.

4. As a result of this willful violation the Defendant/Father should be incarcerated for 24 hours to ensure compliance with the [Consent] [O]rder. This sentence shall be suspended so long as the [Father] pays \$1,500 in attorney’s fees to attorney for [Mother] and arranges for make up visitation for Plaintiff/Mother from Friday October 9, 2020 at 5:30 to Sunday October 11, 2020 at 5:30 PM.

5. It is, therefore, ORDERED, ADJUDGED AND DECREED that Defendant/Father shall be incarcerated

3. At the January 2020 hearing, Mother stated that she was moving forward only on civil, not criminal, contempt.

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for 24 hours to ensure compliance with the [Consent] [O]rder. This sentence shall be suspended so long as the [Father] pays \$1,500 in attorney's fees to attorney for [Mother] within 24 hours of his attorney receiving notice that the order has be[en] signed and arranges for make up visitation for Plaintiff/Mother Friday October 9, 2020 at 5:30 to Sunday October 11, 2020 at 5:30 PM.

Father filed a timely notice of appeal of the Contempt Order on 25 February 2020. This appeal is properly before this Court under N.C. Gen. Stat. § 7A-27(b) (2019).

II. Discussion**A. Interpretation of Consent Order**

¶ 7 **[1]** Father first argues that the Consent Order's provisions regarding summer vacation are ambiguous and therefore Father could not have willfully violated the Contempt Order as Mother claims. As a result, according to Father, the trial court erred by finding him in civil contempt. We agree that the Consent Order is ambiguous. Father's interpretation of the Consent Order is at least as reasonable as Mother's proposed interpretation. The Consent Order is not a model of clarity. Because the Consent Order is ambiguous and Father acted in accordance with his reasonable interpretation of the Consent Order, we hold that Father did not willfully violate the terms of the Consent Order.

¶ 8 We review the trial court's conclusions of law in a civil contempt order *de novo*. *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009). Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the district court. *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). This Court also reviews a trial court's determination of ambiguity of provisions of a consent order *de novo*:

Our Court has previously held that, as a consent order is merely a court-approved contract, it is subject to the rules of contract interpretation. Our Court has also stated that, when a question arises regarding contract interpretation, whether . . . the language of a contract is ambiguous or unambiguous is a question for the court to determine. In making this determination, words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible. An ambiguity exists in

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a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations.

Myers v. Myers, 213 N.C. App. 171, 175, 714 S.E.2d 194, 198 (2011) (internal citations and quotation marks omitted).

¶ 9 Where a consent order is “fairly and reasonably susceptible” to the interpretations proposed by both parties, it is ambiguous. *See id.* at 175, 714 S.E.2d at 198 (“An ambiguity exists where the ‘language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.’ Stated another way, an agreement is ambiguous if the ‘writing leaves it uncertain as to what the agreement was[.]’ ”) (internal quotation marks omitted) (quoting *Holshouser v. Shaner Hotel Grp. Properties One Ltd. P’ship*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999)).

¶ 10 Section 5A-21 of our General Statutes permits the trial court to hold a party in civil contempt if the “noncompliance by the person to whom the [contempt] order is directed is *willful*[.]” N.C. Gen. Stat. § 5A-21(a)(2a) (2019) (emphasis added). “With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order.” *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (citation omitted). In other words, a party’s noncompliance is willful only if it is shown by the movant that the party’s noncompliance was committed with knowledge of, and stubborn resistance to, the court’s directive. *See id.*; *see also Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted) (“Wilfulness in matters of this kind involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.”).

¶ 11 Here, Mother’s contempt motion alleged that Father had “willfully failed, refused and neglected to abide by the terms and provisions of [the Consent Order] . . . in that the [Father] ha[d] exercised [an] extra vacation week without the [Mother’s] agreement to changing the visitation schedule” after he had already “exercised his two non-consecutive weeks [with the children during their summer vacation].”⁴ At the contempt hearing, Father, the sole testifying witness, stated that during the

4. Although Mother argues on appeal that Father had “engaged in multiple violations” of the Consent Order, Mother’s motion for contempt and the Contempt Order itself identify only one violation: Father’s third week of summer visitation in 2019. As Mother did not seek to hold Father in contempt for any other alleged violations of the Consent Order, we do not consider her arguments regarding Father’s “past history of violations of the [Consent] Order” since this was not presented to the trial court.

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children's summer vacation in 2019, he exercised two consecutive weeks with the minor children in Europe and an additional non-consecutive third week of vacation with the children in Nebraska. Father provided Mother with written notice of these summer trips on 22 May 2019. Nonetheless, the trial court concluded that Father had willfully violated the Consent Order by taking the children for an extra week of summer vacation against the wishes of Mother. This was error.

¶ 12 When interpreting an agreement, the court must give the words used "their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible" *Piedmont Bank & Tr. Co. v. Stevenson*, 79 N.C. App. 236, 241, 339 S.E.2d 49, 52, *aff'd*, 317 N.C. 330, 344 S.E.2d 788 (1986); *Anderson v. Anderson*, 145 N.C. App. 453, 458, 550 S.E.2d 266, 269-70 (2001).

¶ 13 As noted above, physical custody of the minor children during summer vacation is governed by Paragraph 2 of the Consent Order, which supersedes and takes priority over the regular physical custody schedule set out in the Consent Order. Paragraph 2 governs summer visitation "[n]otwithstanding [any] contrary provisions" in the Consent Order. Subsection 2(e) provides Father with custody of the minor children for "at least two non-consecutive weeks during each summer (school) vacation period" so long as Father provides "adequate, written notice of his proposed period of summer vacation for the upcoming summer period, (within 5 days of making the plans) including where he is traveling with the minor children." (Emphasis added.) The Consent Order further provides that "in the event [Father] travels out of town with the minor children," he may retain physical custody of the children for "two consecutive weeks for the trip[.]" In addition, the Consent Order states that "both parties agree to work together to arrange appropriate compromises when applicable regarding the . . . summer and holiday periods and with regard to the children attending summer camp and the like[.]"

¶ 14 Father asserts that a "reasonable interpretation of the [summer vacation] provision is that a party cannot have less than the guaranteed minimum time, but he/she may have more by giving timely written notice of his/her 'proposed period of summer vacation for the upcoming summer period.'" Father's interpretation of the Consent Order is based in part upon interpreting the words "at least" to mean "no less than." In other words, Father contends that he is guaranteed *no less than* two non-consecutive weeks with the children during summer vacation, and his weeks must be non-consecutive unless he and the children travel out of the country, and that he may also provide notice of additional summer vacation time if it is non-consecutive to the two other weeks and does not interfere with Mother's designated week with the children.

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¶ 15 On the other hand, Mother contends there is “only one reasonable interpretation of the summer vacation provisions” of the Consent Order. Her interpretation is based upon the words “at least,” as well, but she interprets this language to mean “no more than.” Mother argues that “[e]ach party is *limited* to two weeks and one week vacation respectively, upon proper notice absent the consent of the other party.” (Emphasis added.) She argues this interpretation is supported by the use of the words “at least,” specifically that the “terms ‘at least’ used within this provision represent a term of limitation over the [Father’s] vacation.” Thus, Mother claims that the “only reasonable interpretation” is that Father can have *no more than* two weeks unless she “agrees to extra time but cannot be limited to less than two weeks.” Because both parties are allowed “at least” a certain period of summer vacation, Mother contends that the usual interpretation of the words “at least” would lead to the absurd result of a “‘race to notice’ vacation time where either party could designate essentially the entire summer as vacation by January 1st of each year.” Mother posits that the ability to designate the entire summer as vacation time is contrary to the overall intent of the Consent Order for the parties to share joint custody of the children.

¶ 16 Had Father attempted to designate the entire summer as his vacation time, except for Mother’s designated week, based upon the provision granting him “at least” two weeks of summer vacation custody, it may be easier to consider his interpretation of the summer-visitation provisions unreasonable, if not entirely wrong, since taking the entire summer would require Father to claim more than two *consecutive* weeks. But Father’s interpretation of the words “at least” as meaning “no less than” is based upon the “usual and ordinary” meaning of the words and is not unreasonable. In the factual context of this case, Father’s unchallenged testimony indicated that he and the children had normally taken a vacation to Europe each year, and they went to France and Belgium during the two-week vacation in 2019. In addition, he and the children had normally visited his family in Nebraska each year, and this was the purpose for exercising a third week with the children during the summer of 2019. Again, Father did not attempt to exercise custody over the children for the entire summer, and his interpretation of the summer-visitation provisions is reasonable. Likewise, Mother’s interpretation of the summer-visitation provisions as guaranteeing her one week and Father two weeks, but no more unless agreed otherwise, is also reasonable in the context of the entire Consent Order, even though her interpretation is based on using the words “at least” as a term of limitation. This is all to say that the provisions of the Consent Order regarding summer visitation are ambiguous.

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¶ 17 Where terms of an agreement are ambiguous, the trial court may consider parol evidence to explain the agreement:

Our courts, in determining the intent of the parties, look first to the language of the agreement. *See Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (“If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract”). If a term is ambiguous, parol evidence may be admitted to explain the term. *See Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E.2d 306, 309 (1980) (“Although parol evidence may not be allowed to vary, add to, or contradict an integrated written instrument . . . an ambiguous term may be explained or construed with the aid of parol evidence”). A closer examination of the contested provisions of the agreement is therefore warranted to determine if the intent of the parties can be ascertained from the plain language, or if parol evidence could properly be admitted to explain ambiguous terms.

Jackson v. Jackson, 169 N.C. App. 46, 54, 610 S.E.2d 731, 737, *rev’d*, 360 N.C. 56, 620 S.E.2d 862 (2005) (adopting dissenting opinion of Hunter, J., stating that the intent of the parties can be determined by the plain language of the agreement, and any ambiguities creating questions of fact may be properly resolved with the use of parol evidence).

¶ 18 But here, neither party presented any parol evidence to explain or construe their respective interpretations of the terms of the Consent Order. Mother did not testify at the contempt hearing, and Father testified to his understanding of the summer-visitation provisions as allowing him “at least”—meaning “no less than”—two weeks and that since he gave Mother the required notice of his summer plans, which were not in conflict with her week of summer visitation or the children’s other summer plans, Father believed he complied with the Consent Order. While Father acknowledged that Mother had objected to the third week of summer vacation, he (reasonably) interpreted the Consent Order as entitling him to the third week of vacation so long as he gave proper notice to Mother. Again, Father’s interpretation of the Consent Order was at least as reasonable as Mother’s interpretation, and Mother presented no parol evidence to support her interpretation beyond the four corners of the document. In the end, the summer-visitation provisions in the Consent Order are ambiguous, and Father’s interpretation of those terms was not unreasonable.

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¶ 19 As the Consent Order is ambiguous, the trial court erred by holding Father in civil contempt as he did not willfully violate the Consent Order:

With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order. If the prior order is ambiguous such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have “knowledge” of that order for purposes of contempt proceedings. Due to the ambiguity of the 1983 judgment here, we reverse the trial court’s adjudication of contempt.

Blevins, 137 N.C. App. at 103, 527 S.E.2d at 671 (internal citations omitted). Father’s uncontested testimony at the contempt hearing demonstrated his genuine, reasonable belief that the summer-visitation provisions in the Consent Order did not require the parties to mutually agree on their proposed summer schedules. And Mother failed to present any evidence suggesting that Father’s alleged noncompliance was committed with knowledge of, and stubborn resistance to, the directives set out in the Consent Order.⁵ *See id.* at 103, 527 S.E.2d at 671. In short, because Father acted upon his reasonable interpretation of the ambiguous provisions of the Consent Order, we hold that the trial court erred by concluding that Father had willfully violated the Consent Order.

¶ 20 Father also argues on appeal that even if he was not entitled to exercise a third week of visitation under the Consent Order, the trial court erred by holding him in civil contempt because he was in compliance with the Consent Order *before* Mother had filed her motion for contempt. Because his alleged violation was based on a single incident in the past, Father contends the trial court could only find him in criminal, not civil, contempt. However, based upon our holding that the Consent Order provisions regarding summer visitation are ambiguous, we need not and do not address this argument.

B. Attorney’s Fees

¶ 21 [2] Father also argues that the trial court erred by awarding attorney’s fees. We agree.

¶ 22 Although we have determined the trial court erred by holding Father in civil contempt, this holding does not automatically eliminate the issue

5. Indeed, Mother acknowledges that Father “expressed a belief that the [Consent] Order allowed him to engage in” the very behavior that Mother alleged to be in noncompliance with the same.

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of attorney's fees. In some limited circumstances, a party who has filed a contempt motion may recover attorney's fees even where the alleged contemnor cannot be held in contempt at the time of the hearing. In *Ruth v. Ruth*, this Court addressed an award of attorney's fees to a father who sought to hold the mother in contempt for failure to return the children after visitation. *Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003). After the father had filed the motion for contempt, the mother returned the children to the father. *Id.* at 125, 579 S.E.2d at 911. Because the mother had come into compliance with the court's order before the hearing, this Court held that the "district court was without authority to adjudge [the mother] 'to be in willful civil contempt' or to commit her to the custody of the sheriff, even for a suspended sentence, and those portions of the order must be vacated." *Id.* at 126, 579 S.E.2d at 912. However, this Court affirmed the award of attorney's fees to the father because the mother did not come into compliance until *after* the contempt motion was filed:

As a general rule, attorney's fees in a civil contempt action are not available unless the moving party prevails. Nonetheless, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney's fees is proper.

Therefore, that portion of the order requiring plaintiff to pay defendant's North Carolina attorney's fees in the amount of \$1,425 is affirmed.

Id. at 127, 579 S.E.2d at 912 (internal citation omitted) (quoting another source). The "limited situation" presented in *Ruth* does not appear and is not applicable in this case. Even if Father's exercise of the third week of visitation had violated the Consent Order, that week of visitation was the sole alleged violation of the Consent Order, and it occurred *before* Mother filed her motion for contempt. There is no legal basis for an award of attorney's fees to Mother in this situation, and, therefore, we vacate the Contempt Order in its entirety.

III. Conclusion

¶ 23

For the foregoing reasons, we vacate the Contempt Order entered 20 February 2020.

VACATED.

Judges TYSON and ZACHARY concur.

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MOMEN WALY, PLAINTIFF
v.
SOHA ALKAMARY, DEFENDANT

No. COA19-1054

Filed 17 August 2021

1. Appeal and Error—appeal from custody order—motion to dismiss—Appellate Rule violations

A father's motion to dismiss the mother's appeal from a permanent custody order was denied. The mother could not have violated Appellate Rule 7(a)(1), as the father asserted, because that subsection was deleted from the Rules in 2017. Although the mother did violate Rule 28(b)(6) by failing to state the applicable standard of review for some of the issues she raised in her brief, the Court of Appeals chose to hear the appeal because the Rule violation did not impair its ability to review the mother's arguments.

2. Child Custody and Support—jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—parties left the State after initial custody determination

The trial court had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to enter a permanent custody order in a custody action where, after the court entered the first temporary custody order, the parties relocated out of North Carolina. Based on UCCJEA's provisions, the action "commenced" in North Carolina, which had been the child's "home state" for over six months before the father filed his complaint, and the "initial child custody determination" also occurred in North Carolina; thus, the North Carolina court retained its "initial determination" jurisdiction even after the parties left the state.

3. Appeal and Error—Rule 58—child custody action—motion to stay proceedings—oral ruling not put in writing

In an appeal from a permanent custody order, the Court of Appeals lacked jurisdiction to review the mother's argument that the trial court should have stayed the custody proceeding based on North Carolina being an inconvenient forum. Even if the mother's pro se letter to the district court clerk's office had qualified as a proper motion to stay under Civil Procedure Rule 7(b), the trial court never entered a written order memorializing its oral ruling (denying the motion), as required under Rule 58.

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4. Child Visitation—father’s visitation—lack of compliance by mother—sufficiency of evidence

In a child custody action, where the trial court granted primary custody to the father after having originally given him secondary custody with visitation in a temporary order, competent evidence supported the court’s finding that the mother had no interest in fostering a relationship between the father and their daughter and that she had repeatedly violated prior visitation orders—despite numerous requests and contempt motions filed against her—by refusing to let the father visit or speak to the child.

5. Child Visitation—father’s visitation—facilitation by mother’s sister—finding of fact—sufficiency of evidence

In a child custody action, where the mother had secured a domestic violence protective order (in another state) against the father and therefore placed her sister in charge of coordinating the father’s visits with the child, competent evidence supported the trial court’s finding that the sister did not want to facilitate the father’s visitation and that—given her tendency to unilaterally change the times for phone visits, leaving the father with no alternate means to contact his child—she was no longer the right person to coordinate the visits.

6. Child Visitation—custody action—domestic violence protective order against father—no-contact provision—interference with visitation rights

In a child custody action filed in North Carolina, where the mother later moved to New Jersey and obtained a domestic violence protective order (DVPO) there against the father, the trial court did not improperly use the New Jersey DVPO against the mother when changing primary custody to the father. Evidence supported the court’s findings that the mother used the DVPO’s no-contact provision to make it harder for the father to coordinate visits with their child. The court also gave the parties a chance to seek clarification from the New Jersey court regarding the no-contact provision before issuing its custody ruling, thereby trying to respect the DVPO’s terms. Additionally, the order granting primary custody to the father, which required the parties to communicate indirectly through a secure online application, complied with the DVPO, which deferred to the terms of the father’s visitation as ordered in the North Carolina action.

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7. Enforcement of Judgments—full faith and credit—domestic violence protective order from another state—child custody action in North Carolina

In a child custody action filed in North Carolina, where the mother later moved to New Jersey and obtained a domestic violence protective order (DVPO) there against the father, the trial court properly gave full faith and credit to the New Jersey DVPO in its permanent custody order granting primary custody to the father. The order required the parties to communicate indirectly through a secure online application to coordinate visitation, and therefore it complied with the DVPO's no-contact provision prohibiting direct contact between the parties. Furthermore, the DVPO specifically deferred to the terms of the father's visitation as originally laid out in the court's prior custody order, which required the parties to communicate in some way to set up visits.

8. Evidence—authentication—screen shots of online video calls—no evidence

In a child custody action, the trial court did not err by declining to admit an exhibit showing screenshots of online video calls between the father and the mother's sister (regarding the father's visitation with the child). The mother failed to properly authenticate the exhibit where she merely described the screenshots as "a scribe between [the father] and my sister" without presenting any evidence that the screenshots were what she claimed them to be.

Appeal by defendant from order entered 27 June 2019 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Court of Appeals 14 April 2020.

Lewis, Deese, Nance & Ditmore, LLP, by Renny W. Deese, for plaintiff-appellee.

John M. Kirby, for defendant-appellant.

STROUD, Chief Judge.

¶ 1

Mother appeals a permanent custody order granting primary custody of her daughter to Father. For the reasons discussed below, we hold the trial court had jurisdiction to enter the custody order under the Uniform Child Custody Jurisdiction and Enforcement Act. We also hold that where Mother did not file a proper motion for a stay of the North

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Carolina proceedings, and the trial court did not enter an order ruling on this issue, we have no jurisdiction to consider this argument. The trial court's order requiring the parties to communicate for purposes of coordination of visitation and parenting through Our Family Wizard after Mother's sister was unavailable to serve as a go-between did not fail to give full faith and credit to the New Jersey domestic violence protective order. As Mother failed to authenticate the evidence she contends the trial court should have admitted, the trial court did not err in excluding the evidence. As the trial court's findings of fact were supported by the evidence, we affirm the trial court's order.

I. Background

¶ 2 Mother and Father married in January 2013 and had one daughter, Sandy,¹ in February of 2014. Father filed a complaint for child custody, child support, and attorney withdrawal in Cumberland County District Court on 19 July 2016. On 29 August 2016, Mother filed an answer and counterclaims for emergency custody, a restraining order, custody, child support, alimony, and attorney's fees. Mother alleged that she had traveled to New Jersey with Sandy on 4 June 2016 to visit family and was notified by Father one week later that he wanted to end their marriage. Thereafter, Mother and Sandy moved to New Jersey and Father relocated to Florida.

¶ 3 The trial court entered a temporary child support order directing Father to pay Mother \$869.60 per month in child support on 14 October 2016 and a temporary child custody order on 18 October 2016. The parents were awarded joint legal custody with Mother having primary custody and Father having secondary physical custody by way of phased-in visitation. The order established the specific dates for Father's physical visitation with Sandy; granted Father Facetime/Skype/Webcam visitation every Tuesday, Thursday, and Sunday at 6:00 p.m.; and directed Mother and Father to exchange their respective addresses and phone numbers. The order also included a finding "[t]hat the parties should consider that since neither currently resides in Cumberland County, North Carolina: Cumberland County, North Carolina is no longer the most convenient forum for custody litigation."

¶ 4 The trial court entered an interim equitable distribution and post-separation support order on 23 November 2016. On 30 January 2017, Mother filed a motion for contempt alleging that Father violated both

1. A pseudonym is used.

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the temporary child support order and the interim equitable distribution and postseparation support order.

¶ 5 On 23 February 2017, Father posted on Facebook: “Nothing is ever forgotten, nothing is ever forgiven. Everything will be remembered, everything will be avenged.” In response, Mother filed for a temporary restraining order in New Jersey and advised the New Jersey court of the pending custody case in North Carolina and the temporary custody order. On 11 April 2017, the New Jersey trial court entered a final restraining order (“DVPO”) barring Father “from having any oral, written, personal, electronic, or other form of contact or communication with:” Mother. Under the DVPO, Father’s visitation with Sandy remained “as scheduled in North Carolina order” with the additional requirements that Father coordinate Facetime visitation with Mother’s sister, and the parties exchange Sandy at the New Bridge Police Department.

¶ 6 On 20 July 2017, Father filed a motion for contempt alleging that Mother refused to allow him visitation and Facetime access with Sandy. Father filed an amended motion for contempt on 1 August 2017 and included an additional allegation that Mother refused to provide Father with the phone number and address of her new residence. On 15 August 2017, Mother filed motions for emergency relief, contempt, and attorney’s fees.

¶ 7 On 21 December 2017, the trial court entered a holiday visitation order, which awarded Father visitation with Sandy from 21 December to 23 December 2017. The holiday visitation order referenced the DVPO’s minor modifications to Father’s visitation and found that “[o]therwise, the New Jersey court deferred the terms of [Father’s] visitation to this court and the prior order entered by this court.” On 26 December 2017, Father filed a motion for contempt, which alleged that Mother’s refusal to allow him visitation with Sandy, coupled with her failure to provide her sister’s contact information, violated the holiday visitation order. Father also alleged that, in contravention of prior orders, Mother had relocated and refused to provide Father with the address or phone number.

¶ 8 Around 8 January 2018,² Mother filed a verified complaint for divorce in New Jersey seeking divorce, alimony, child support, child custody, equitable distribution, and attorney’s fees. The complaint included the allegations required by the Uniform Child Custody Jurisdiction and Enforcement Act—respectively North Carolina General Statute

2. The complaint in the record does not have a file stamp and does not indicate the date it was signed. We glean 8 January 2018 from subsequent testimony.

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§ 50A-209 (“Information to be submitted to court”) and New Jersey Statute Annotated § 2A:34-73(a)(1) (same)—regarding other proceedings between the parties:

There have been no previous proceedings between [Mother] and [Father] respecting the marriage or its dissolution or respecting the division of property of the parties in any Court except FV-12-1444-17 in connection with a Final Restraining Order issued by this Court in favor of [Mother] against [Father], A-4086-16 in connection with [Father’s] appeal of the Final Restraining Order, and File # 16CVD5260 in Cumberland County District Court, NC.

Specifically, Mother requested “[j]udgment against [Father]” on the various claims, including: “[f]or child support;” “[f]or custody of the unemancipated child;” and “[r]egistering and/or granting full faith and credit to the Orders entered in North Carolina[.]”

¶ 9 Mother mailed a letter dated 12 January 2018 to the Cumberland County District Court Clerk’s Office entitled “motion to stay North Carolina proceeding.” In the letter, Mother explained that she had filed a divorce action in New Jersey and “[a]s a single mom, it’s been a financial burden on [her] to still have an attorney in North Carolina, and for the added cost of travel to North Carolina to represent [herself] in court.” She asked for the trial court to “please accommodate [her] request to stop all proceedings in North Carolina.” The letter was not file-stamped but according to the transcript, Mother handed it to the trial court. There is no indication the letter was served upon Father’s counsel until it was discussed during the hearing on 5 March 2018.

¶ 10 On 5 March 2018, the trial court held a hearing on child custody, child support, and contempt. The trial court engaged in an extensive discussion with the parties regarding the issue of jurisdiction, Mother’s “motion to stay” letter, and Mother’s New Jersey divorce complaint. The trial court stated, “I’m not staying anything here” and “[a]s far as I’m concerned, North Carolina law is the law until I say it[.]’s not or until I talk to a judge up there and we determine what to do.” The trial court told Mother to give Father her sister’s contact information and to have her attorney in New Jersey contact Father’s attorney.

¶ 11 On 14 November 2018, Mother filed her second complaint in New Jersey seeking divorce, child support, back child support, alimony, and custody. The second New Jersey complaint was filed *pro se* on a form complaint entitled “Form 1D: Complaint for Divorce/Dissolution Based

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on Irreconcilable Differences.” Paragraph 11 of the form instructed: “List any other court cases where you or your spouse/civil union partner are plaintiffs or defendants, such as cases for adoption, bankruptcy, personal injury, child support, custody, domestic violence, etc.” Mother listed only “Final restraining order A-4086-16II,” referring to the New Jersey DVPO. She also certified that “[t]he matter in controversy in the within action is not the subject of any other action pending in any court or of a pending arbitration proceeding, nor is any such court action or arbitration proceeding presently contemplated.”

¶ 12 On 7 January 2019, Father filed a motion for contempt and a motion for modification of custody. Father alleged that Mother failed to produce verification of her monthly expenses and Sandy’s medical records, in violation of a prior order, and alleged a substantial change in circumstances mandated an emergency order awarding Father primary custody of Sandy. Father alleged that Mother neglected Sandy, interfered with Father’s relationship with Sandy, failed to obtain necessary medical care for Sandy, was not stable, and was unable to provide for Sandy’s needs.

¶ 13 On 5 March 2019, the New Jersey trial court entered an amended DVPO on remand from the appellate division reflecting “that the sole predicate act of domestic violence serving as the basis for the final restraining order . . . is harassment[.]” (Original in all caps.) The no-contact provision in the amended DVPO remained unchanged from the original DVPO. Specifically, the Amended DVPO included the following provision regarding “Parenting time (visitation)”: “Parenting will be the same as scheduled in North Carolina order. Pick up/drop off at Old Bridge PD. [Father] to text [Mother’s] sister (Sally Alkamary) regarding parenting time only. CS shall be as per North Carolina order.” (Original in all caps.) Based upon the record before this Court, the New Jersey court did not change any of the provisions of the DVPO relevant to visitation, did not contact the trial court in North Carolina, and did not make any indication of any proceeding or issue regarding child custody pending in the New Jersey court.

¶ 14 On 11 and 12 March 2019, the trial court held a hearing on termination of post separation support, alimony, and equitable distribution. The trial court entered an order on 9 May 2019. Mother and Father stipulated to the terms of equitable distribution, termination of postseparation support, and dismissal of Mother’s alimony claim. Father was awarded Facetime visitation with Sandy on Monday, Wednesday, and Friday between 7:30 and 8:30 p.m. and physical visitation with her 13-14 March 2019 and 16-22 April 2019. The trial court continued the custody hearing until 14 May 2019, finding that “North Carolina has continuing

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jurisdiction of the custody matters and has instructed the parties to file the necessary motions in New Jersey to clarify the New Jersey [DVPO] and to ensure that the parties are allowed contact only as it relates to the health and welfare of the minor child.” As a result, in order “to have clarification with regard to the provisions of the New Jersey [DVPO] which prohibit any contact between these parties[.]” the trial court postponed entering judgment on custody until 14 May 2019.

¶ 15 Following the 14 May 2019 hearing on custody, the trial court entered an order on 14 June 2019. The trial court found that on 11 and 12 March 2019 it had heard evidence regarding custody and had given “to the parties specific instructions to file the necessary motions in New Jersey to clarify the New Jersey order and to ensure that the parties are allowed contact only as it relates to the health and welfare of the minor child.” Despite these instructions, however, the trial court found that “there has been no hearing or subsequent New Jersey order to address” the provisions of the New Jersey Amended DVPO, which prevent Father from any contact with Mother. The court noted its concern that Mother “may and can legally use the provisions of the protective order from New Jersey that she sought and obtained to legally shield [Father] from contact with the minor child and to further alienate the child from [Father].” The trial court also found that it received information that Mother’s sister no longer wanted to facilitate Father’s visitation with Sandy. The court ordered Mother and Father to appear before the court on 24 June 2019 for entry of judgment and directed Mother to bring Sandy to Cumberland County on that date “so that the child can be in the care of [Father] for an extended visitation[.]”

¶ 16 Following the 24 June 2019 hearing, the trial court entered a permanent custody order. The trial court concluded it was in Sandy’s best interest that Father have primary physical custody and Mother have secondary custody in the form of visitation. In regard to the DVPO, the trial court found that it was in Sandy’s best interest “for the parties to have contact for the purpose of facilitating visitation and to discuss the welfare of the minor child.” (Original underlined.) Mother appeals.

II. Motion to Dismiss

¶ 17 **[1]** On 30 January 2020, Father filed a motion to dismiss Mother’s appeal for alleged violations of North Carolina Appellate Rules 7(a)(1) and 28(b)(6). Father argues that Mother’s brief “fails to properly cite in the Record the findings or conclusions the trial court made allegedly unsupported by the evidence in violation of Rule 7(a)(1)” and “fails to state a Standard of Review for each issue presented (except the first issue presented) in violation of Rule 28(b)(6).”

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¶ 18 As an initial matter, we note North Carolina Appellate Rule 7(a)(1)³ was deleted in 2017. As a result, Mother could not have violated this rule. *See generally* N.C. R. App. P. 7(a)(1) (2015). As to Father's second argument, North Carolina Appellate Rule 28(b)(6) provides in pertinent part:

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

N.C. R. App. P. 28(b)(6). Mother's brief contains a "standard of review" section containing the applicable standard of review for some, but not all, of the issues she advances before this Court. Although "[v]iolation of [Rule 28(b)(6)] may result in dismissal[.]" *State v. Parker*, 187 N.C. App. 131, 135, 653 S.E.2d 6, 8 (2007) (citation omitted), "[w]e also note that our Rules of Appellate Procedure allow for the imposition of less drastic sanctions," *Id.* (citation omitted). Any alleged violations do not impair this Court's ability to review Mother's arguments, so "[i]n this instance, we elect not to take any action." *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 649, 801 S.E.2d 150, 155 (2017).

III. UCCJEA

¶ 19 Mother argues that the trial court "lost jurisdiction because the parents and the child relocated out of North Carolina." (Original in all caps.) Alternatively, Mother contends that the trial court should have stayed the proceedings in North Carolina and never proceeded to the custody trial and permanent custody award.

3. Prior to its deletion, Appellate Rule 7(a)(1) stated, "[i]f the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion." N.C. R. App. P. 7(a)(1) (2015).

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¶ 20 The Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) has been codified in North Carolina under Chapter 50A of the North Carolina General Statutes. It “provides a uniform set of jurisdictional rules and guidelines for the national and international enforcement of child-custody orders.” *Hamdan v. Freitekh*, 271 N.C. App. 383, 386, 844 S.E.2d 338, 341 (2020) (citation omitted). The “Official Comment”⁴ to North Carolina General Statute § 50A-101 identifies the purposes of the UCCJEA:

- (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
- (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
- (3) Discourage the use of the interstate system for continuing controversies over child custody;
- (4) Deter abductions of children;
- (5) Avoid relitigation of custody decisions of other States in this State;
- (6) Facilitate the enforcement of custody decrees of other States;

Official Comment to N.C. Gen. Stat. § 50A-101 (2019).

A. Initial Child Custody Determination

¶ 21 **[2]** Mother argues that the trial court did not have jurisdiction under the UCCJEA to enter the permanent custody order because after the filing of the action and entry of the first temporary custody order, she moved to New Jersey and Father moved to Florida.

¶ 22 “Whether the trial court has jurisdiction under the UCCJEA is a question of law subject to *de novo* review.” *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015) (citation omitted). North Carolina

4. “This Court has noted that the commentary to a statutory provision can be helpful in some cases in discerning legislative intent.” *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993).

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General Statute § 50A-201, which addresses jurisdiction for initial child custody determinations, provides in pertinent part:

(a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an *initial child-custody determination* only if:

(1) *This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]*

N.C. Gen. Stat. § 50A-201 (emphasis added).

¶ 23 The UCCJEA defines “[h]ome state” as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.” N.C. Gen. Stat. § 50A-102(7). “‘Initial determination’” is defined as “the first child-custody determination concerning a particular child.” N.C. Gen. Stat. § 50A-102(8). “‘Child-custody determination’” is defined as “a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order.” N.C. Gen. Stat. § 50A-102(3). “‘Child-custody proceeding’” is defined as “a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue.” N.C. Gen. Stat. § 50A-102(4). “‘Commencement’” is defined as “the filing of the first pleading in a proceeding.” N.C. Gen. Stat. § 50A-102(5).

¶ 24 Here, the “commencement” of the proceeding was the filing of Father’s complaint for child custody in Cumberland County on 19 July 2016. Mother then filed counterclaims, including a custody claim, in the Cumberland County action. At the “commencement” of this “child custody proceeding,” North Carolina was clearly the “home state” of the child, as the child had resided in North Carolina for more than six months. N.C. Gen. Stat. § 50A-102 (4), (5), and (7). Mother does not dispute that North Carolina was the home state at the commencement of the proceedings; she contends the trial court “lost jurisdiction after it issued the temporary custody order and all of the parties permanently left the State for more than six months.”

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¶ 25 However, “[o]nce jurisdiction of the [trial] court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined.” *In re Baby Boy Searce*, 81 N.C. App. 531, 538-39, 345 S.E.2d 404, 409 (1986) (citations omitted). Here, the custody action was commenced in North Carolina. Even though Father, Mother, and child all moved out of the state shortly after the initiation of the suit, under the circumstances of this case North Carolina retained its jurisdiction under the UCCJEA until the conclusion of the custody matter. *See id.* This continuity promotes the UCCJEA’s purpose of “[a]void[ing] jurisdictional competition and conflict with courts of other States[.]” Official Comment to N.C. Gen. Stat. § 50A-101.

¶ 26 Contending that the “Permanent Custody Order was a modification of the temporary custody order[.]” Mother argues “[t]he controlling North Carolina statute is G.S. § 50A-202[.]” North Carolina General Statute § 50A-202, which addresses “[e]xclusive, continuing jurisdiction[.]” states:

(a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:

(1) A court of this State determines that neither the child, the child’s parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child’s care, protection, training, and personal relationships; or

(2) A court of this State or a court of another state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in this State.

(b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201.

N.C. Gen. Stat. § 50A-202. North Carolina General Statute § 50A-203, which governs “[j]urisdiction to modify determination,” provides:

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Except as otherwise provided in G.S. 50A-204, a court of this *State may not modify a child-custody determination made by a court of another state* unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:

- (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
- (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (emphasis added). The Official Commentary to North Carolina General Statute § 50A-203 explains that Section 203 “complements Section 202 and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State.” Thus, North Carolina General Statutes §§ 50A-202 and 50A-203 apply to “modification” jurisdiction, whereas North Carolina General Statute § 50A-201 applies to “initial determination” jurisdiction. In this case, the trial court was not exercising modification jurisdiction because it was not considering modifying “a child-custody determination *made by a court of another state*[.]” N.C. Gen. Stat. § 50A-203 (emphasis added). After Father’s commencement of the custody action in the trial court, North Carolina retained its “initial determination” jurisdiction. Because North Carolina was the “home state” of Sandy for more than six months before Father filed the custody action in Cumberland County, North Carolina had jurisdiction to enter the permanent custody order, and North Carolina General Statute § 50A-202 is not the “controlling statute” under these facts.

¶ 27

Mother contends that New Jersey had jurisdiction simply because she and Sandy had moved to New Jersey and Father had moved to Florida. But based upon the record before this Court, Mother apparently never attempted to have the New Jersey court exercise jurisdiction over custody, despite the trial court’s efforts encouraging the parties to consider if New Jersey may be a more appropriate forum for the case and continuing the custody hearing to give Mother time to address the issue in New Jersey. Mother did obtain a DVPO in New Jersey, and

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the provisions of the DVPO and Amended DVPO addressed communication and contact between Mother and Father for purposes of visitation, but as the trial court noted, New Jersey had deferred to the North Carolina court as to the custody determination, specifically noting in both orders, “Parenting will be the same as scheduled in North Carolina order.” (Original in all caps.) We also note that Mother had filed separate actions in New Jersey including claims for child custody, but the action filed in 2018 was dismissed. The action Mother filed *pro se* in 2019 did not comply with the UCCJEA as it did not identify the North Carolina child custody proceeding as required by New Jersey Statutory Annotated § 2A:34-73(a)(1). *See* N.J. Stat. Ann. § 2A:34-73(a)(1) (West 2019) (“[The pleading or affidavit shall state whether the party] has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any[.]”).

¶ 28 If Mother had taken the appropriate actions and filed the appropriate motions or pleadings, it is possible that North Carolina may have declined to exercise jurisdiction on the basis of an “inconvenient forum” determination pursuant to North Carolina General Statute § 50A-207. But, as discussed below, the trial court declined to make such a determination at the 5 March 2018 hearing.

B. Stay of Custody Proceedings

¶ 29 **[3]** Alternatively, Mother argues that the trial court “should have stayed custody proceedings due to convenience to the parties and witnesses.” (Original in all caps.) Specifically, Mother contends because the trial court “determined as of 14 October 2016 that ‘North Carolina is no longer be [sic] most convenient forum for custody litigation[,]’ . . . even if North Carolina had jurisdiction, the [trial court] should have stayed the action in March 2018 on [Mother’s] motion, and should not have proceeded to a custody trial and custody award in 2019.”

¶ 30 Here, at the 5 March 2018 hearing, the trial court engaged in an extensive discussion with Father’s counsel, Ms. Hatley, and Mother regarding jurisdiction and Mother’s request to stay the North Carolina proceedings:

THE COURT: He lives in Florida and she lives in New Jersey?

MS. HATELY: That’s correct.

THE COURT: Why are we here?

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MS. HATLEY: Because the -- this Court had jurisdiction --

. . . .

MS. HATLEY: --at the time of the filing, Your Honor and

THE COURT: And then everybody moved

MS. HATLEY: That's correct. And we only have temporary orders, which are not being complied with. So at this point, you have jurisdiction.

Mother explained that she had a DVPO against Father from New Jersey and that she had counsel in New Jersey, but not North Carolina. As to the complaint Mother filed in New Jersey for divorce, equitable distribution, child support, and child custody, Ms. Hatley explained:

I'm aware of the restraining order. That is up on appeal. I'm aware that she's filed for divorce in New Jersey as well as overseas in their home of origin, the country of origin that these parties are from. So there are attorneys that have been involved in those cases, but no other state has assumed jurisdiction of the custody, and no other state has assumed jurisdiction of any of these spousal support or property issues.

The court then addressed the letter Mother sent to the trial court entitled "motion to stay."

THE COURT: And you've not had any contact from this attorney in New Jersey?

MS. HATLEY: No, Your Honor. No one has given me a single call. Nor has there been a proper motion to -- to release jurisdiction on the transfer (inaudible) this court.

THE COURT: *It's not in the file, but there is -- there's something here that she has written that she just handed up entitled a Motion to Stay (inaudible) proceeding dated January 12 of 2018.*

[MOTHER]: I am -- have a copy, yeah, in here.

MS. HATLEY: Your Honor, I'm not sure a Motion to Stay is the appropriate motion.

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[MOTHER]: Yeah. I am here copy. I need to have copy, yeah. I am a copy of -- I (inaudible) a copy from Stay of Motion prepared on the court. I have (inaudible).

THE COURT: *Let Ms. Hatley see those and then hand those back to her.* Well, you probably want to tell them to tell your lawyer that everything is pending down here and that this one was filed first. So when the judge up there talks to me, this is the court where it's going to happen. And your lawyer needs to get in touch with Ms. Hatley. Because it just doesn't happen like this. And I'm concerned about some of the things that are in here, particularly (inaudible) that there have been no previous proceedings between plaintiff and defendant respecting the marriage dissolution or respecting the division of property of the parties in any court except as was entered in the restraining order, which is not exactly accurate because this case has been pending for quite a while. So they should have known about this. And they requested relief for alimony, support, custody, equitable distribution. And as I look at my docket, I have custody, support, ED all here. So North Carolina at this point is the appropriate place for this to happen because this is where it was instituted. Now, as I read -- this was granted in the order also, if the Court to grant custody to her, (inaudible) to us on what to do thereafter.

MS. HATLEY: Your Honor, if it's like our 50(b) and 50(a), I would -- I would argue to the Court that 50(a) controls and the custody order of this court would control.

THE COURT: As far as I'm concerned, North Carolina law is the law until I say it's not or until I talk to a judge up there and we determine what to do. Okay.

....

THE COURT: I'm concerned more about the restraining -- the restraining order is their issue. Apparently he went up there and submitted to the jurisdiction, so that is what it is. But the custody and all these other issues are still proper over here, at least for the present time. Hand those back to her, please. Yeah, Ms.

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Hatley, there is a – what’s – what is denominated as a Motion to Stay, filed January 18th. It’s all in here.

MS. HATLEY: Was that signed by her or was that signed by the New Jersey attorney, Your Honor?

THE COURT: I think – it appears that she mailed it. She has her tracking number there and that apparently came to the clerk and it was placed in the file.

MS. HATLEY: Because I know we would have to be heard on the motion to stay and ask that that be denied at this point.

THE COURT: I’m not staying anything in here.

MS. HATLEY: Wonderful.

THE COURT: I can tell you that right now. I’m not doing that. I’m not – I’m not saying it won’t subsequently be released to New Jersey. I’d have to talk to a judge up there and see exactly what they’ve done. They’re probably about like us, so. . . Well, I did hear you at one point say you were going to get an attorney for down here now again. When do you intend to do that?

[MOTHER]: I am – I haven’t done it because I have -- I don’t have money to attorney here and I –

THE COURT: Well, let me start by saying you probably want to talk to your lawyer up there and let them know to get in touch with Ms. Hatley forthwith, that means right away, so that – you’ve got a lawyer –

[MOTHER]: Okay.

THE COURT: – up there.

[MOTHER]: Yes.

THE COURT: This case started down here.

[MOTHER]: Yes.

THE COURT: And we are here. I have not relinquished jurisdiction in the case. North Carolina still has control. Also tell your lawyer that if he does not get in touch with Ms. Hatley very, very soon, this Court may be issuing additional orders.

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[MOTHER]: Okay.

THE COURT: Okay. All right. *And your court has already deferred to us in terms of the visitation and all of that*, so --while you all sort out the restraining order.

(Emphasis added.)

¶ 31 Mother contends the trial court should have treated her letter as a formal motion for stay under North Carolina General Statute § 50A-207 and that the trial court erred by not granting a stay based on North Carolina being an inconvenient forum. “The decision to relinquish jurisdiction to another state on the basis of more convenient forum is reviewed for an abuse of discretion.” *In re M.M.*, 230 N.C. App. 225, 228, 750 S.E.2d 50, 52-53 (2013) (citation omitted). North Carolina General Statute § 50A-207 provides:

(a) A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this State;
- (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;

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(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, *it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.*

(d) A court of this State may decline to exercise its jurisdiction under this Article if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

N.C. Gen. Stat. § 50A-207 (emphasis added).

¶ 32

Here, Mother did not file a motion requesting a stay, but the trial court addressed her letter at the hearing. The trial court, however, did not memorialize its oral ruling that “I’m not staying anything here” in a written order. In North Carolina, “a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court,” N.C. Gen. Stat. § 1A-1, Rule 58 (2019), and “[t]he entry of judgment is the event which vests this Court with jurisdiction[.]” *Worsham v. Richbourg’s Sales & Rentals, Inc.*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) (citation omitted). Thus, even if we were to assume Mother’s letter could be considered as a proper motion to stay proceedings pursuant to Rule 7(b) of the North Carolina Rules of Civil Procedure, because the trial court never entered an order ruling Mother’s “motion to stay” letter, this Court does not have jurisdiction to determine whether the trial court abused its discretion by not granting a stay. *See id.*

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¶ 33

Rule 7(b) of the North Carolina Rules of Civil Procedure provides:

- (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.
- (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

N.C. Gen. Stat. § 1A-1, Rule 7(b) (2019). At the hearing, the trial court indicated that Mother's letter was "filed January 18th" and "it appears that she mailed it," explaining "[s]he has her tracking number there and that apparently came to the clerk and it was placed in the file." The letter was not filed stamped or served on Father's counsel prior to the hearing, nor did it identify any legal basis for the trial court to stay its proceedings. Thus, Mother's purported motion did not comply with the Rules of Civil Procedure.

¶ 34

As the trial court did not enter an order ruling upon Mother's purported motion, we have no jurisdiction to consider Mother's argument. However, we appreciate the trial court's efforts to address Mother's contentions, even in the absence of a motion. The trial court engaged in an extensive discussion regarding its jurisdiction and did not rule out the prospect that jurisdiction could be transferred to New Jersey in the future stating, "I'm not saying it won't subsequently be released to New Jersey. I'd have to talk to a judge up there and see exactly what they've done." The trial court explained its concern that Mother, in her divorce action in New Jersey, certified

there have been no previous proceedings between plaintiff and defendant respecting the marriage dissolution or respecting the division of property of the parties in any court except as was entered in the restraining order, which is not exactly accurate because this case has been pending for quite a while. So they should know about this. And they requested relief for alimony, support, custody, equitable distribution. And as I look at my docket, I have custody, support, ED all here.

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¶ 35 The trial court's statements reflect its consideration of certain factors enumerated in North Carolina General Statute § 50A-207(b), including: "[t]he nature and location of the evidence required to resolve the pending litigation, including testimony of the child;" "[t]he ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;" and "[t]he familiarity of the court of each state with the facts and issues in the pending litigation." N.C. Gen. Stat. § 50A-207(b)(6)-(8). The trial court also discussed and allowed Mother to present evidence as to "[w]hether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child" and "[t]he relative financial circumstances of the parties[.]" N.C. Gen. Stat. § 50A-207(b)(1), (4). Indeed, Mother was given specific directions on what actions to take for the trial court to consider making a determination that North Carolina was an inconvenient forum and transferring jurisdiction to New Jersey.

IV. Compliance with Visitation Order

¶ 36 **[4]** Mother argues that the trial court "erred in finding that [she] had not complied with visitation orders and had frustrated internet and phone visitation." (Original in all caps.) She contends that the trial court's order "fails to provide a factual basis for a finding that the mother did not comply with visitation orders, or that she failed to foster a relationship between the child and father; and these findings are contrary to the evidence regarding visitation."

In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact. . . . Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal.

Peters v. Pennington, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citations and quotation marks omitted).

¶ 37 Mother challenges the following findings of fact:

42. Since the date of separation she has not fostered a relationship and has willfully withheld visitation.

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43. She has not made any genuine efforts to foster that relationship and there is a substantial likelihood that this may continue into the foreseeable future.

....

45. [Mother] has made numerous efforts to circumvent and violate this court's orders as to visitation with [Father] and to otherwise delay the matter.

46. She has resisted allowing the father to visit and to otherwise have contact with the minor child.

47. She has used the New Jersey DVPO as a means of avoiding the father having any contact with her and relegating his efforts to exercise his visitation contingent upon his contact with relatives of the mother.

....

50. It is clear to this court she does not intend to foster a relationship with [Father] and to award her primary custody would likely result in constant and continuous violations and further alienating the Plaintiff father from the minor child.

....

59. She was ordered by the Court in December 6, 2016, to allow Christmas visitation in December, 2017 beginning December 21, 2017, and she willfully failed to do so.

60. The Father was authorized to have facetime, skype and other telephonic communication with the minor child and the mother willfully refused to comply.

....

62. She offered excuses which were not valid and continued to not comply resulting in numerous contempt motions being filed and more requests at preliminary hearings.

....

64. [Father] has had to come to court each time to enforce compliance and to get additional visitation. She has repeatedly refused to comply with the orders.

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Mother contends the challenged findings of fact are “repetitive, conclusory, and generalized” and without “specific factual context[.]” Mother asserts that “[l]ooking at the actual evidence regarding visitation, the record shows that the [Father] had full physical visitation with the child in conformity with the temporary custody orders, with two exceptions.”

¶ 38 The record evidence supports the trial court’s findings of fact regarding Father’s visitation. At the 11 March 2019 hearing, Father testified that from June of 2016 to March of 2017, Mother “wo[uldn’t] let [him] speak to [his] daughter.” After he “unsuccessfully tried several times to speak to [his] daughter, [he] hired an attorney in North Carolina and [he] attempted to get a court order to go see [his] daughter.” After detailing the specific instances when Mother refused to allow him the visitation ordered by the trial court, Father explained that “25 percent of the time [he] was successful to see [his] daughter” and “[t]he other 75 percent [Mother] refused.” According to Father, the trial court’s directive that he communicate with Sandy via Skype three days a week at 6:00 p.m. “has been fulfilled 50 percent of the time” and during those times, Sandy was located at the mall or park and “doesn’t want to pay attention to talk to [him,]” which Father believed Mother was doing intentionally “so to limit [his] interaction with [his daughter] on purpose.” He testified about the difficulties arising from Mother’s sister’s facilitation of Skype visitation and noted that “the bottom line is every single visitation there is harassment of some sort” and “[e]very single visitation” he “had to get a court order, because otherwise [he didn’t think [he] would be able to.” Moreover, in a finding of fact not challenged by Mother, the trial court found that “[t]he New Jersey Appellate Court noted that the trial court chastised the mother for not complying with this Court’s custody order. He admonished her that it was wrong to interfere with the father’s visitation time.” See *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” (citations omitted)).

¶ 39 Mother’s assertion that she had fully complied with the visitation orders with the exception of two occasions goes to the trial court’s assessment of the weight and credibility of the evidence, which is in the purview of the trial court:

A trial judge passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. . . . It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as

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finder of fact with respect to the weight and credibility that attaches to the evidence. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Phelps v. Phelps, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (citations and quotation marks omitted). Here, the trial court did not have to believe Mother’s version of the facts. The findings of fact made by the trial court are supported by competent evidence.

V. Sister’s Facilitation of Visits

¶ 40 [5] Mother asserts the trial court “erred in finding that [her] sister did not want to facilitate visitation.” (Original in all caps.) The trial court made the following pertinent findings of fact regarding Mother’s sister’s facilitation of Father’s visitation:

73. The evidence clearly shows that the sister recently changed the times for the skype or phone contact unilaterally leaving the father with no choice but to accept the change or wait until he could get back into court.

....

77. This Court has no jurisdiction over the sister, a nonparty to this action. Consequently, the coordination with her for visitation is not appropriate.

78. Moreover, she (the sister) has already unilaterally changed the time leaving the father without recourse. He can’t contact the mother otherwise and this court lacks the power to order the sister to act accordingly.

79. Moreover, at the court session on May 14, 2019, the court received information from [Father] through counsel that the sister was no longer willing to supervise the visits.

¶ 41 Mother challenges Finding of Fact 79 and argues “[t]here was no testimony that [her] sister was not willing to help with the visits” and the trial court “appears to have not only relied on arguments of [Father’s] counsel to support its order, but it seems to have ignored [Mother’s] counsel’s response to this.” She asserts that “[i]n view of the importance

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of this issue of [Mother's] sister facilitating visitation, this finding was error and requires reversal."

¶ 42 However, Finding of Fact 79 was supported by evidence. At the 14 May 2019 hearing, the following exchanges occurred between Ms. Hatley and Mother's counsel, Ms. White:

MS. HATLEY: What I can say to the Court is my client has indicated that to his knowledge nothing has changed with regard to the restraining order in New Jersey, and that the sister who had been coordinating is no longer willing to be involved in that. So that puts us kind of where I know the Court was afraid that we would –

. . . .

MS. WHITE: . . . The other issue is in regards to communication between the parties. It was indicated by Attorney Hatley earlier that her client hasn't been able to talk to the child. Your Honor, my client did bring in a copy of the logs and it does show that he's had numerous phone calls.

MS. HATLEY: Your Honor, that was not my representation. My representation was that the sister who was facilitating does not wish to be involved any further.

MS. WHITE: Okay. And that is – that is not what is indicated from me. It's just the sister is a dentist, as we described before, and she does have specific times that she's available. And calls have still been made since that time.

¶ 43 Finding of Fact 79 finding reflects Father's counsel's statement to the court that Father "indicated that to his knowledge" "the sister who had been coordinating is no longer willing to be involved in that." The trial court did not find as fact that Mother's sister was unwilling to supervise visits. Finding of Fact 79 is supported by evidence.

¶ 44 Moreover, it was not necessary for Mother's sister personally to come to a hearing in North Carolina and testify that she no longer wanted to facilitate visitation, as she was not a party subject to the district court's jurisdiction. The trial court had no authority to direct Mother's sister to do anything. Father presented evidence regarding his difficult experiences with attempting to facilitate visitation through Mother's

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sister. The sister's actions and Father's inability to exercise visitation as ordered tend to indicate that the sister was either unwilling or unavailable to facilitate visitation as needed. Even if Mother's sister had been amenable to facilitating visitation, there was no abuse of discretion in the court finding she was not appropriate for the role in light of the unchallenged findings of fact based upon Father's actual experience in attempting to coordinate visitation through Mother's sister. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

VI. DVPO

¶ 45

Mother contends that the trial court "erroneously used the New Jersey DVPO against" her and "failed to give full faith and credit to the DVPO." (Original in all caps.) In its order entered 27 June 2019, the trial court made the following findings of fact regarding the DVPO:

25. The Defendant Mother filed for and obtained a DVPO in the State of New Jersey. A hearing was held and a permanent order was entered April 11, 2017. This order was granted and remains in effect. The New Jersey court has now directed that the visitation be as indicated by the North Carolina Court.

26. The New Jersey Court found that she moved to New Jersey around November, 2016 and did not disclose to [Father] her location.

27. This Court notes that while it is very clear that North Carolina was the Home State at the time of filing, the testimony offered here today does conflict with some of the facts found as indicated in the NJ case.

28. It is also clear that the alleged acts of physical domestic violence allegedly occurred in North Carolina. The case in fact went to the New Jersey Appellate Court and was remanded to the trial court for further orders.

29. One of the major issues on the appeal was to clarify that the act of domestic violence found was not a physical assault or physical domestic violence, but what was described as a threat. While the Defendant Mother testified as to alleged physical assault, that was not the finding of the trial court as to the reason for the DVPO.

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30. The corrections were made to correct the order and the order was filed. That order has now been entered and the DVPO is a permanent one in full force and effect.

31. The DVPO order has a specific no contact provision as it relates to the father and the mother. The order was entered based upon a Facebook post on the father's Facebook page, not as a result of any actual physical violence nor any direct threat sent by the father to the mother. The Court found that even though he didn't send the item to her and she was not his friend on Facebook, the information could find its way to her.

32. The item posted stated: "Nothing is ever forgotten, nothing is ever forgiven. Everything will be remembered, everything will be avenged."

33. The New Jersey order further indicated a section awarding temporary custody to the mother, presumably consistent with this Court's order.

....

44. The New Jersey Appellate Court noted that the trial court chastised the mother for not complying with this Court's custody order. He admonished her that it was wrong to interfere with the father's visitation time.

....

47. She has used the New Jersey DVPO as a means of avoiding the father having any contact with her and relegating his efforts to exercise his visitation contingent upon his contact with relatives of the mother.

....

72. The mother now has a Domestic Violence Protective Order that prohibits the father from having contact with her. The Father is required to contact a non-party sister of [Mother] to facilitate the contact and the visitation.

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73. The evidence clearly shows that the sister recently changed the times for the skype or phone contact unilaterally leaving the father with no choice but to accept the change or wait until he could get back into court.

74. The Mother's failure to abide by the Court's Orders coupled with the DVPO no contact order and the requirement therein that he contact a nonparty relative to coordinate his visitation are all problematic in this case.

75. This further complicates matters in that the father cannot contact the mother to express his unhappiness and the violation of the order as he is prohibited from having contact with her.

76. This allows the mother to withhold and deflect reasons as to why the visitation did not occur.

77. This Court has no jurisdiction over the sister, a nonparty to this action. Consequently, the coordination with her for visitation is not appropriate.

78. Moreover, she (the sister) has already unilaterally changed the time leaving the father without recourse. He can't contact the mother otherwise and this court lacks the power to order the sister to act accordingly.

79. Moreover, at the court session on May 14, 2019, the court received information from the Plaintiff through counsel that the sister was no longer willing to supervise the visits.

80. The New Jersey court rightly determined that these parties will have to interact as a result of the minor child for the next "many, many years." The trial court further indicated the parties would have to see each other "continuously or at least come into contact" as it relates to dealing with the minor child through the years.

81. Unfortunately, the no contact provision is problematic for the Plaintiff father. It places him in a significant dilemma.

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82. A fair reading could expose him to contempt and/or criminal prosecution for contacting the mother in reference to the visitation or the status of the minor child while in his care.

83. Moreover, it could be used as a spear or a shield by the defendant mother, and she has clearly demonstrated a propensity to thwart his visitation and further alienate him from the minor child.

84. Consequently, this court directed the parties, specifically the Defendant Mother, to return to the New Jersey Court to have the provision removed and/or clarified to specifically allow contact for the purposes of complying with this Court's Custody Order.

85. The Court has now determined that the no contact order remains in effect and this is a barrier to the Plaintiff Father's ability to visit with and co-parent his minor child.

86. The restraining order may provide the mother with a legal basis to thwart the father's efforts to visit with, contact, locate or otherwise have a relationship with his child.

87. The sister has now changed the time for telephone calls. The father cannot contact the mother to complain. This Court lacks jurisdiction over the sister and this is fundamentally unfair to the Plaintiff father in this matter.

. . . .

102. To be clear, the order being entered today posed a very difficult decision for the Court. It is not one the court enters lightly. Had the Defendant Mother complied with this court's orders and made the effort to accommodate the visitation with the father, the Court well likely would have placed primary custody with her. However, the use of the DVPO to essentially hide behind, the failure to foster the relationship and follow the court orders as to visitation and her repeated attempts to shift the focus to the DVPO, all led to the inescapable conclusion that she has little if any intention to foster a relationship with the father.

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. . . .

104. In fact, during the entrance of the order in Court today, the Court directed the parties to disclose their addresses and contact information for purposes of facilitating contact and arrange for visitation and effectuation of the order and the Defendant Mother was reluctant to provide her email due to the New Jersey order. This clearly demonstrates the dilemma and her continued resistance.

105. The New Jersey DVPO order does provide that the visitation be as indicated by the North Carolina Court. The Court enters this order and specifically finds it is in the best interest of the minor child for the parties to have contact for the purpose of facilitating visitation and to discuss the welfare of the minor child.

. . . .

109. It is in the best interest of the minor child that the parties communicate through the Our Family Wizard mode and the cost will be borne by the Plaintiff Father.

A. Use of DVPO Against Mother

¶ 46 [6] Mother contends that the trial court “erroneously used the New Jersey DVPO against” her. (Original in all caps.) She argues “[t]he rationale of the District Court raises very serious public policy concerns pertaining to domestic violence” and “[i]n yet another odd twist, the District Court actually directed [her] to go back to the New Jersey proceeding to have it modified to provide for communication between the parties to accommodate visitation.”

¶ 47 The order is replete with findings about the effects of the DVPO on Father’s visitation. Mother asserts that Findings of Fact 47, 76, 86, and 102 are “inexplicable” because “[i]t is entirely unclear the manner in which [she] is using or abusing the DVPO to avoid visitation.” However, the trial court’s unchallenged findings of fact establish the harmful way that Mother utilized the DVPO to her advantage in terms of Father’s visitation. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Additionally, record evidence supports these findings. For example, at the 12 March 2019 hearing, Father stated that Mother filed an action on 14 November 2018 in New Jersey for divorce, support, equitable distribution, and “to

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have New Jersey assume jurisdiction, even after [the trial court] told her that was not appropriate.” In the complaint, Mother certified that the *only* action she and Father were parties to was the domestic violence proceeding and did not direct the New Jersey court to the ongoing North Carolina proceedings. According to Father, by not alerting the New Jersey court of the trial court’s visitation orders, Mother “makes every effort to keep this restraining order so that my client can’t have any contact with her in place.”

¶ 48 Additionally, the trial court took affirmative steps to *not* use the DVPO against Mother. At the March 12, 2019 hearing on custody, termination of post separation support, alimony, and equitable distribution, the trial court explained it “c[ould not] deal with” the no contact provision because it as was “a New Jersey issue.” Accordingly, the trial court stated from the bench:

I also indicated to them, as I’ve indicated in the record, that the restraining order issued in New Jersey, because of the way it is written and prohibiting contact, specifically prohibiting the plaintiff father from having contact with the defendant mother, is problematic for this Court. It potentially puts him at risk for criminal charges by simply following this order. I do not believe that was the intent of the New Jersey court, but I cannot glean that, or how they would interpret it, from a reading of the order. Consequently, it will be incumbent upon the parties to file an appropriate matter in the New Jersey court to get the no-contact order lifted or to be advised that it is this Court’s intention to allow contact between the parties for the purposes of visitation and the best interest of the minor child as this Court does in the usual domestic orders. So they can either remove that provision or place some clarifying language so that it will be clear that to the extent the parties have contact with regard to following this order that the Court will enter they will not be in violation or he will not be in violation of the restraining order.

¶ 49 The court continued the hearing for the limited purpose of allowing the parties to seek clarification of the order, specifically finding that it “will enter judgment as to the issue of child custody on May 14, 2019 and hopes to have clarification with regard to the provisions of the New Jersey order which prohibit any contact between these parties by that

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date.” Mother apparently failed to take any action as anticipated as the basis for the continuance. At the 14 May 2019 hearing, Mother’s counsel stated, “I don’t have a status on whether a court date has been scheduled.” Thus, despite the court’s directives, Mother took no action.

¶ 50 Moreover, the North Carolina custody order is not inconsistent with the DVPO and does not lessen Mother’s protection. The DVPO provided that Father was to text Mother’s sister “regarding parenting time only” and also provided that “[p]arenting will be the same as scheduled in North Carolina order. Pick up/drop off at Old Bridge, P.D.” (Original in all caps.) The North Carolina order would necessarily allow the parents to communicate as needed for the visits to happen, particularly where the parties do not live in the same state. The only method of communication identified by the New Jersey DVPO was mother’s sister, and the evidence before the trial court indicated that Mother’s sister was no longer willing or available to facilitate visitation. Thus, since Mother’s sister could no longer be the intermediary for communications, the trial court ordered for the parties to communicate through Our Family Wizard at Father’s expense.

¶ 51 Use of Our Family Wizard to facilitate and document communications between Mother and Father is entirely consistent with the Amended DVPO. Our Family Wizard is an online application which provides tools to facilitate communications between parents, including a message board and calendar. Our Family Wizard does not require the parents to communicate directly with one another but provides a secure platform to share messages, and the messages cannot be edited or deleted after they are sent, thus providing a record for the court, if needed. Use of Our Family Wizard for coordination with Father provides Mother a far more secure method of communication with Father than using her sister as a go-between. This argument is without merit.

B. Failure to give Full Faith and Credit to DVPO

¶ 52 [7] Mother argues that “[i]n addition to using the New Jersey DVPO against [her], the lower court also failed to honor that order. The court, in effect, modified the terms of the DVPO, and further distorted the facts that led to the DVPO. In doing so the lower court failed to give full faith and credit to the DVPO as required by federal law.”

¶ 53 The Full Faith and Credit Clause “requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered.” *State of New York v. Paugh*, 135 N.C. App. 434, 439, 521 S.E.2d 475, 478 (1999) (citation omitted). “We review *de novo* the issue of whether a trial court has properly

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extended full faith and credit to a foreign judgment.” *Marlin Leasing Corp. v. Essa*, 263 N.C. App. 498, 502, 823 S.E.2d 659, 662-63 (2019).

¶ 54 Here, the trial court did not modify the DVPO, and the custody order does not alter the effect of the DVPO. The DVPO specifically deferred to the trial court’s custody order by explicitly stating, “parenting will be the same as scheduled in North Carolina order.” (Original in all caps.) There is no evidence that the trial court failed to honor the DVPO; indeed, as discussed above, the trial court accommodated the restrictions of the DVPO by ordering communications through Our Family Wizard after Mother’s sister was no longer available to facilitate communications. The trial court was not required to give the parties opportunities to seek modification of the no contact provisions of the New Jersey DVPO, but the trial court did give them this opportunity. As the parties failed to take advantage of this opportunity, the trial court ordered communications through Our Family Wizard. Father is still not allowed to contact Mother directly, as required by the DVPO.

VII. Exclusion of Mother’s Exhibit

¶ 55 **[8]** Finally, Mother contends the trial court erred by not admitting screenshots of Skype calls allegedly between her sister and Father because the “[s]creenshots are admissible, and it is not necessary that the account holder authenticate the screen.”

¶ 56 Mother is correct that screenshots *can* be admissible evidence, but this evidence still must be authenticated. At the 11 March hearing, Mother sought to introduce what she described as “a scribe between [Father] and my sister” into evidence. Father objected and the trial court allowed his motion to strike the evidence. In the record before this Court, Mother has included the screenshots of Skype calls she sought to present as evidence. However, the *only* information provided to the trial court as to the authentication of the exhibit was Mother’s statement that it was “a scribe between [Father] and my sister.”

¶ 57 “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C. Gen. Stat. § 8C-1, Rule 901(a) (2019). North Carolina Rule of Evidence 901 provides various methods to authenticate evidence, including “[t]estimony that a matter is what it is claimed to be.” N.C. Gen. Stat. § 8C-1, Rule 901(b)(1).

¶ 58 On appeal, Mother argues the screenshots “should have been admitted” because they “were crucial to show the communication between

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the child and her father” and Father “had introduced similar screenshots.”⁵ We note that the admission of Father’s “similar screenshots” is not relevant to whether Mother’s evidence should be admitted. We must assume that Father’s evidence was either properly authenticated or Mother failed to object to admission of his evidence; there is no issue on appeal as to his evidence. However, beyond Mother’s description of the screenshots as “a scribe between [Father] and my sister[,]” Mother presented no “evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* Based upon Mother’s own statement, she was not a party to the alleged screenshots and her only knowledge of the information needed to authenticate the screenshots would have come only from her sister, who was not present to testify. Mother did not properly authenticate the screenshots and the trial court did not err by sustaining Father’s objection to admission of this evidence. *Cf. State v. Gray*, 234 N.C. App. 197, 206, 758 S.E.2d 699, 705 (2014) (“We hold the testimony in this case by Detective Snowden, who recovered the text messages from Mr. Diaz’s cell phone, and Ms. McKoy, with whom Mr. Diaz was communicating in the text messages illustrated in exhibit twelve, was sufficient to authenticate [photographs of the text messages].”). As a result, the trial court did not err in excluding the screenshot of the skype calls.

VIII. Conclusion

¶ 59

For the reasons discussed above, we affirm the trial court’s order.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

5. We also note that even if the trial court had admitted Mother’s exhibit, the trial court would still determine the weight and credibility of the evidence. *See Phelps*, 337 N.C. at 357, 446 S.E.2d at 25. Based upon our review of the proposed exhibit, admission of Mother’s proposed screenshots would likely not change the trial court’s analysis of the facts. The communications between the parties were clearly fraught with difficulty, based on the evidence presented by both parties.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 AUGUST 2021)

CONTAMINANT CONTROL, INC. v. ALLISON HOLDINGS, LLC 2021-NCCOA-430 No. 20-531	Cumberland (17CVS3532)	Affirmed
ERICKSON v. N.C. DEPT OF PUB. SAFETY 2021-NCCOA-431 No. 20-704	Office of Admin. Hearings (19OSP04911)	Affirm
FREEMAN v. GLENN 2021-NCCOA-432 No. 20-478	Mecklenburg (18CVS22182)	No Error
IN RE S.R.J.T. 2021-NCCOA-433 No. 20-29-2	Wilkes (15JA200)	Affirmed in part, Vacated in part, and Remanded
JACKSON v. DUKE UNIV. HEALTH SYS., INC. 2021-NCCOA-434 No. 20-670	Durham (19CVS1462)	Affirmed
LOMICK v. N.C. DEPT OF PUB. SAFETY 2021-NCCOA-435 No. 20-587	N.C. Industrial Commission (TA-26231)	Dismissed
LOWREY v. CHOICE HOTELS INT'L, INC. 2021-NCCOA-436 No. 20-662	Durham (19CVS3400)	VACATED AND REMANDED WITH INSTRUCTIONS
LOWREY v. CHOICE HOTELS INT'L, INC. 2021-NCCOA-437 No. 20-649	Durham (19CVS3400)	VACATED AND REMANDED WITH INSTRUCTIONS
ROSS v. N.C. STATE BUREAU OF INVESTIGATION 2021-NCCOA-439 No. 20-599	N.C. Industrial Commission (TA-24836)	Affirmed
STARNES v. STARNES 2021-NCCOA-440 No. 21-26	Catawba (17CVD1148)	Affirmed

STATE v. FORTE 2021-NCCOA-441 No. 19-1157	Wilson (15CRS50196) (15CRS50200) (15CRS50247) (15CRS50473)	No Error in Part, Vacated in Part, and Remanded
STATE v. GAVIN 2021-NCCOA-442 No. 20-172	Wake (17CRS208896) (17CRS210187)	No Error
STATE v. LENT 2021-NCCOA-443 No. 20-565	Brunswick (19CRS1415) (19CRS1417) (19CRS2335) (19CRS51914) (19CRS51915)	No Error
STATE v. LINDSEY 2021-NCCOA-444 No. 20-609	Richmond (17CRS52679-81) (17CRS52683-84) (18CRS1434)	Dismissed in Part, Vacated in Part, and Remanded
STATE v. WELCH 2021-NCCOA-445 No. 20-642	Chatham (18CRS577)	No Error
STATE v. YORK 2021-NCCOA-446 No. 20-601	New Hanover (17CRS3405) (17CRS52659)	Dismissed in Part; No Plain Error in Part

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CODY LYNN BRADFORD, PLAINTIFF

v.

JENNIFER BRADFORD, DEFENDANT

No. COA20-358, 20-377

Filed 7 September 2021

1. Divorce—equitable distribution—voluntary dismissal without prejudice—action terminated

On consolidated appeal from an order dismissing a wife's motions in the cause for equitable distribution in two separate cases, the appellate court held that the trial court properly dismissed the wife's equitable distribution claim in the first case (initiated by a custody complaint filed by the husband, to which the wife filed counterclaims, including for equitable distribution) because after all of the claims except for the wife's equitable distribution claim had been fully resolved or dismissed by the parties, the wife's voluntary dismissal without prejudice of the equitable distribution claim had the effect of terminating the action. Therefore, her equitable distribution claim could be reasserted only by timely commencing a new civil action or by asserting the claim in the other Chapter 50 action (for absolute divorce) pending between the parties.

2. Divorce—equitable distribution—motion in the cause—before entry of absolute divorce judgment

On consolidated appeal from an order dismissing a wife's motions in the cause for equitable distribution in two separate cases, the appellate court held that the trial court erred by dismissing the wife's equitable distribution claim in the second case (initiated by an absolute divorce complaint filed by the husband) where the wife asserted her equitable distribution claim via a motion in the cause before entry of the absolute divorce judgment.

Appeals by defendant from order entered 24 February 2020 by Judge Hal Harrison in District Court, Yancey County. Heard in the Court of Appeals 26 January 2021.

Law Offices of Jamie A. Stokes, PLLC, by Jamie A. Stokes, for plaintiff-appellee.

Donald H. Barton, for defendant-appellant.

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STROUD, Chief Judge.

¶ 1 Jennifer Bradford (“Wife”) appeals from an order dismissing her two separate motions in the cause for equitable distribution in two separate cases. Wife appealed the dismissal of each equitable distribution claim asserted in the two cases separately. The trial court entered one order addressing both motions to dismiss in the two separate actions, and we have consolidated these appeals pursuant to North Carolina Appellate Rule 40. *See* N.C. R. App. P. 40.

¶ 2 In File No. 18 CVD 201, we hold the trial court properly dismissed Wife’s equitable distribution claim because when Wife filed the motion in the cause, all pending claims had been fully resolved or dismissed by the parties and the effect of her prior voluntary dismissal of her equitable distribution claim without prejudice under Rule 41(a)(1) was “to terminate the action.” In File No. 19 CVD 224, we hold the trial court erred in dismissing Wife’s equitable distribution claim because Wife asserted her equitable distribution claim by a motion in the cause filed *before* entry of the absolute divorce judgment. As a result, we affirm in part and reverse and remand in part the trial court’s order.

I. Background

¶ 3 Husband and Wife married 1 April 2011, had one child in 2015, and separated 26 September 2018. On 27 September 2018, Husband filed a complaint in File No. 18 CVD 201 for *ex parte* temporary and permanent custody, and the trial court awarded him immediate sole legal and physical custody of the child. On 22 October 2018, Wife filed an answer and counterclaims for divorce from bed and board, child custody, child support, equitable distribution, post separation support, alimony, and attorney’s fees. Subsequently, Husband and Wife each filed equitable distribution inventory affidavits. On 25 April 2019, the trial court entered a permanent child custody order.

¶ 4 A hearing on Wife’s equitable distribution counterclaim was calendared for 17 December 2019. Wife took a voluntary dismissal with prejudice of all of her counterclaims — except her claim for equitable distribution — on 1 October 2019.

¶ 5 On 11 October 2019, Husband filed a complaint for absolute divorce in File No. 19 CVD 224. In the complaint, Husband asked “that the equitable distribution claim in Yancey County File No. 18CVD201 be severed and preserved.” A hearing on the absolute divorce claim in File No. 19 CVD 224 was calendared for 27 January 2020.

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¶ 6 The trial court entered a final pre-trial order on equitable distribution in File No. 18 CVD 201 on 18 November 2019. On 17 December 2019, after mediation reached an impasse, Wife took a voluntary dismissal without prejudice of her counterclaim for equitable distribution in File No. 18 CVD 201. On 27 January 2020, Wife filed motions in the cause asserting claims for equitable distribution in both File Nos. 18 CVD 201 and 19 CVD 224; both motions were filed at 8:21 A.M. Later the same day, after a testimonial hearing upon the absolute divorce claim, the trial court entered an absolute divorce judgment in File No. 19 CVD 224. The signed divorce judgment was filed at 10:07 A.M.

¶ 7 On 5 February 2020, Husband filed motions to dismiss Wife's motions in the cause in File Nos. 18 CVD 201 and 19 CVD 224. Husband's motions to dismiss were based upon North Carolina General Statute § 50-20 and North Carolina General Statute § 1A-1, Rule 12(b)(1), raising the issue of subject matter jurisdiction. In his motion to dismiss Wife's motion in the cause in File No. 18 CVD 201, Husband argued that File No. 18 CVD 201 was closed when Wife dismissed her equitable distribution counterclaim without prejudice and, accordingly, there were no pending causes of action as of 27 January 2020 in that case. In his motion to dismiss Wife's motion in the cause in File No. 19 CVD 224, Husband alleged that Wife did not file an answer or request an extension of time after being served with the complaint for absolute divorce; Wife did not seek leave of court to answer the complaint for absolute divorce; and Wife did not bring an independent equitable distribution cause of action after voluntarily dismissing her counterclaim for equitable distribution in File No. 18 CVD 201.

¶ 8 Husband's motions to dismiss came on for hearing on 14 February 2020 in Yancey County District Court. Neither Wife nor her attorney was present at the hearing.¹ In an order entered 24 February 2020, the trial court granted Husband's motions to dismiss Wife's motions in the cause in File Nos. 18 CVD 201 and 19 CVD 224. Wife timely appeals.

II. Standard of Review

¶ 9 The order on appeal ruled on Husband's motion to dismiss based upon subject matter jurisdiction.

1. On appeal, Wife has also challenged the trial court's denial of her motion to continue the hearing on the motions to dismiss based upon her attorney's conflict due to a previously scheduled contempt hearing in Henderson County. She also raised an issue on appeal regarding the lack of at least ten days prior notice of the hearing on the motions to dismiss. Because of our disposition, we will not address the other issues regarding timing of the notice of hearing and denial of the motion to continue.

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Rule 12(b)(1) permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy. We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings. Pursuant to the *de novo* standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trivette v. Yount, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011) (citations, quotation marks, and brackets omitted). Husband also presents an argument regarding the proper method for asserting an equitable distribution claim based upon an interpretation of North Carolina General Statute § 50-11 and thus raises an issue of statutory construction. Statutory construction is an issue of law which we review *de novo* on appeal. *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016).

III. Analysis

¶ 10 The trial court's order addressing the motions to dismiss in both actions includes several findings of fact, but most of the findings address the procedural history of the two cases and some findings address the issues regarding the motion to continue and timeliness of service of the notice of hearing.

¶ 11 The finding of fact relevant to the issues on appeal are as follows:

7. That as of January 27, 2020 there were no causes of action before the court in Yancey County file No. 18 CVD 201.
8. That on or about December 17, 2019 [Wife] took a voluntary dismissal without prejudice of her counterclaim for Equitable Distribution resolving all causes of action in Yancey County file No. 18 CVD 201.
9. That Yancey County File No. 19 CVD 224 is a complaint for Absolute Divorce filed by [Husband] on or about October 11, 2019.
10. That [Wife] was properly served with the divorce complaint in Yancey County File No. 19 CVD 224.
11. That [Wife] has not answered or sought leave of the court to answer or counterclaim in Yancey County File No. 19 CVD 224.

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12. That a divorce judgment was entered in Yancey County File No. 19 CVD 224 on January 27, 2020.

The relevant conclusions of law are as follows:

1. That above “Findings of Fact” are herein incorporated by reference and made a part hereof.
2. The parties are properly before the court, and the Court has jurisdiction over the parties hereto and the subject matter herein.[²]

The trial court concluded it had subject matter jurisdiction but also granted Husband’s motions to dismiss Wife’s equitable distribution claims, apparently based upon its determinations that in File No. 19 CVD 224, Wife “has not answered or sought leave of court to answer or counterclaim” and in File No. 18 CVD 201, “as of January 27, 2020 there were no causes of action before the court in Yancey County file No. 18 CVD 201.”

¶ 12 In North Carolina, “[u]pon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.” N.C. Gen. Stat. § 50-20(a) (2019). “An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 *unless the right is asserted prior to judgment of absolute divorce*.” N.C. Gen. Stat. § 50-11(e) (2019) (emphasis added).

¶ 13 Wife argues “the trial court committed reversible error in dismissing [Wife’s] Motion for Equitable Distribution when [Wife] had properly filed her claim for equitable distribution in both 18-CVD-201 and 19-CVD-224.” (Original in all caps.) Wife contends her claims for equitable distribution

2. Husband’s brief notes that “the trial court concluded as a matter of law in the dismissal Order that the court had subject matter jurisdiction” but contends “that conclusion only applies to the trial court’s jurisdiction to enter the Order dismissing the action, not to whether its jurisdiction had been invoked as to the issue of equitable distribution.” Since Husband’s motions to dismiss were based upon his contention of a lack of subject matter jurisdiction, while the trial court concluded it had subject matter jurisdiction but also dismissed Wife’s claims, the actual meaning of the conclusion is not clear. But we need not address Husband’s contention regarding the interpretation of the order, as subject matter jurisdiction can be raised at any time, even for the first time on appeal, and we conduct *de novo* review of subject matter jurisdiction and issues of statutory interpretation as presented in this appeal. See *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986); see also *Hayes*, 248 N.C. App. at 415, 788 S.E.2d at 652.

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in File Nos. 18 CVD 201 and 19 CVD 224 were preserved because they were filed before the trial court entered an absolute divorce judgment. In both File Nos. 18 CVD 201 and 19 CVD 224, Husband argues the equitable distribution claim cannot be “asserted” by a motion in the cause but that it must be brought by an independent complaint or a counterclaim. In File No. 18 CVD 201, Husband argues Wife’s motion in the cause was untimely because she filed it over 30 days after she was served with the absolute divorce complaint. In File No. 19 CVD 224, Husband argues that “a new complaint is clearly required in order to commence a new civil action following a Rule 41 dismissal, and a motion in the cause in the dismissed action is insufficient.” We address each action in turn.

A. File No. 18 CVD 201- Motion in the Cause Filed After Dismissal of Prior Claim

¶ 14 **[1]** First, we address the trial court’s dismissal of Wife’s motion in the cause for equitable distribution in File No. 18 CVD 201, after her voluntary dismissal of her equitable distribution claim in this action. Husband contends that a new complaint was necessary to commence a new civil action for equitable distribution after Wife took a Rule 41 dismissal of her counterclaims. Specifically, Husband argues that “no statutory authority exists that authorizes the re-initiation of a previously dismissed civil action by motion in the cause[.]” At least to the extent that Wife sought to re-commence the equitable distribution claim by a motion in the previously dismissed civil action, we agree.

¶ 15 As a general rule, the effect of a voluntary dismissal without prejudice under Rule 41(a)(1) is “to terminate the action, and no suit is pending thereafter on which the court can enter a valid order.” *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E.2d 282, 286 (1973). But like most rules, this one has exceptions, and those exceptions depend upon the type of claim or action involved. A Rule 41 dismissal may apply to “an action or any claim therein.” N.C. Gen. Stat. § 1A-1, Rule 41 (2019). Here, Wife had previously dismissed other claims within the same action, and then she dismissed her last remaining claim of equitable distribution. In domestic cases, one action may include several types of claims, and claims within the action may be treated differently. “An ‘action’ is defined as ‘a formal complaint within the jurisdiction of a court of law.’ A ‘claim’ is a ‘demand for money or property’ or a ‘cause of action.’” *Massey v. Massey*, 121 N.C. App. 263, 267, 465 S.E.2d 313, 315 (1996) (quoting Black’s Law Dictionary 28 (6th ed. 1990)).

¶ 16 In *Jackson v. Jackson*, 68 N.C. App. 499, 315 S.E.2d 90 (1984), this Court discussed one of the exceptions to the general rule that a Rule

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41(a)(1) dismissal ends the trial court's jurisdiction to rule on a later motion. There, the plaintiff wife filed an action with claims for "child custody and support, alimony, sequestration of the marital home for the use and benefit of the children, and legal fees." *Id.* at 500, 315 S.E.2d at 90. The defendant husband filed an answer and counterclaims for child custody and support, divorce from bed and board, possession and use of the marital home, alimony, and legal fees. *Id.* After a hearing, in January 1982 the trial court entered an order dismissing the wife's claims with prejudice under Rule 41(b) and dismissing the husband's claims without prejudice due to a defect in notice to the wife. *Id.* In March 1982, the husband filed a motion in the cause for child custody and support and possession of the marital home. *Id.* at 501, 315 S.E.2d at 91. The trial court then entered an order ruling on husband's motion and granting the husband child custody and support. *Id.* The wife filed a motion pursuant to Rule 60(b)(4) to set aside the court's order for lack of jurisdiction; the trial court denied her motion and wife appealed. *Id.* On appeal, the wife argued "the District Court was without jurisdiction to entertain a motion in the cause since no cause existed after the entry of the order of dismissal." *Id.*

¶ 17 This Court noted that under Rule 41(b), "[t]he court's dismissal of plaintiff's claim for alimony operated as a final adjudication on the merits" but held the trial court still retained jurisdiction over the matters of child custody and support based upon husband's motion in the cause filed after the dismissals of both wife's and husband's claims and counterclaims. *Id.* As to jurisdiction, this Court held:

The court's ruling on plaintiff's claims for custody and support cannot be said to be a final adjudication[,] however, since the issue of custody and support remains *in fieri* until the children have become emancipated. Where custody and support are brought to issue by the pleadings, the court retains continuing jurisdiction over these matters even when the issues are not determined by the judgment. Here, where the issues of custody and support were raised in plaintiff's complaint and ruled on by the trial judge, we think it clear that the court retained jurisdiction to entertain and rule on defendant's motion in the cause.

Id. at 501–02, 315 S.E.2d at 91 (citations and quotation marks omitted).

¶ 18 In the context of child custody and support, even where a party has dismissed a claim, the trial court may retain jurisdiction to enter further

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orders. “Indeed, this Court has consistently upheld the continuing jurisdiction of the trial court over child custody and support actions and has often reiterated that the ‘jurisdiction of the court to protect infants is broad, comprehensive and plenary.’” *Massey v. Massey*, 121 N.C. App. 263, 268–69, 465 S.E.2d 313, 316 (1996) (quoting *Latham v. Latham*, 74 N.C. App. 722, 724, 329 S.E.2d 721, 722 (1985)). But equitable distribution claims are not subject to the same rules of continuing jurisdiction as child support and custody claims, nor does the trial court have the same interest in protecting the best interests of the children in this type of claim. For an equitable distribution claim, the general rule controls: Wife’s voluntary dismissal of her equitable distribution claim without prejudice under Rule 41(a)(1) terminated the action.

¶ 19 As of 1 October 2019, all the “claims” in the “civil action” in File No. 18 CVD 201 had been dismissed or fully resolved, with the exception of Wife’s counterclaim for equitable distribution. When Wife filed the notice of voluntary dismissal of this remaining “claim” in the “civil action,” that civil action was closed. Wife took the voluntary dismissal without prejudice, so she still retained the right to assert a “claim” for equitable distribution until entry of an absolute divorce judgment. N.C. Gen. Stat. § 1A-1, Rule 41. But after she dismissed her equitable distribution counterclaim, her claim for equitable distribution could be re-asserted only by timely “commencing” a new “civil action” by filing a summons and complaint or by asserting the claim by a pleading or motion in the other Chapter 50 action pending between the parties, specifically the absolute divorce action in File No. 19 CVD 224. See *id.* Because Wife’s prior dismissal of her equitable distribution claim terminated the action, after the dismissal there was “no suit . . . pending thereafter on which the court [could] enter a valid order[.]” *Collins*, 18 N.C. App. at 50, 196 S.E.2d at 286, and the trial court did not err in allowing Husband’s motion to dismiss Wife’s motion in the cause in File No. 18 CVD 201.

B. File No. 19 CVD 224- Motion in the Cause Prior to Entry of Absolute Divorce Judgment

1. Timing of Claim

¶ 20 [2] We will first address Husband’s argument that Wife was barred from filing an answer or counterclaim, or a motion in the cause including a claim for equitable distribution, because her motion was filed over 30 days after service of the summons and complaint. Husband has cited no cases in support of this argument that Wife’s time to file an answer or counterclaim had “expired” but cites only North Carolina General Statute § 1A-1, Rule 12(a)(1).

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¶ 21 Here, there was no entry of default or other order limiting Wife's ability to file an answer, counterclaim, or motions in the pending absolute divorce action against her. *See* N.C. Gen. Stat. § 1A-1, Rule 55(a) (2019) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute . . . the clerk shall enter his default."). And in a claim for absolute divorce, the procedure of obtaining a judgment by default after entry of default is not available to bar a defendant from answering the divorce complaint even after the expiration of 30 days after service of the summons and complaint because the allegations of the complaint are "deemed to be denied" even if no answer has been filed. N.C. Gen. Stat. § 50-10(a) (2019) ("[T]he material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, *and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury.*" (emphasis added)).

¶ 22 Wife filed her motion before entry of the absolute divorce judgment. Even though she had not filed an answer, the allegations of the absolute divorce complaint were "deemed to be denied" under North Carolina General Statute § 50-10 and Wife's right to file an answer, counterclaim, or motion prior to entry of the absolute divorce had not "expired."

¶ 23 The trial court's order also found Wife had not sought "leave of court" to file an answer or counterclaim. Husband has not identified any statutory requirement for Wife to seek "leave of court" to file an answer or motion in this situation. The reference to "leave of court" appears to be based upon North Carolina General Statute § 1A-1, Rule 15(a), which allows a party to

amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only *by leave of court* or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

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N.C. Gen. Stat. § 1A-1, Rule 15(a) (2019) (emphasis added). Wife had not filed any answer or pleading in this action before filing her motion in the cause, so there was no prior pleading for her to seek “leave of court” to amend. Wife still had the right to file an answer, counterclaim, or motion in the divorce action. The time for Wife to “assert” her equitable distribution claim in this situation expired only upon entry of the divorce judgment, and she filed her motion before entry of the judgment.

¶ 24 The only statutory limitation on the time for bringing an equitable distribution claim pertinent to this case is found in North Carolina General Statute § 50-11, requiring only that the equitable distribution claim be “asserted” before the entry of the absolute divorce judgment. N.C. Gen. Stat. § 50-11(e). The absolute divorce judgment here was entered on 27 January 2020 at 10:21 A.M., when it was written, signed, and filed. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2019) (“[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5.”).

¶ 25 In *Santana v. Santana*, 171 N.C. App. 432, 614 S.E.2d 438 (2005), the wife filed a complaint for absolute divorce. *Id.* at 433, 614 S.E.2d at 439. Her complaint alleged that the issues of child support, alimony, and equitable distribution “‘are to be reserved.’” *Id.* The husband filed an answer joining in the request for absolute divorce. *Id.* The wife then filed a motion for summary judgment on the request for absolute divorce. *Id.* The trial court held the divorce hearing on 11 August 2003 and “orally pronounced and rendered an absolute divorce in open court,” but did not sign and file the divorce judgment until 19 August 2003. *Id.* at 435, 614 S.E.2d at 440. On 18 August 2003, after the hearing and rendition of the ruling but before entry of the divorce judgment, the wife filed a motion alleging, “the parties own marital property located in Mexico, specifically but not limited to a house owned by the [wife] solely and retirement funds in the [husband’s] name [wife] has a marital interest in said property.” *Id.* at 433, 614 S.E.2d at 439 (quotation marks omitted). The wife requested the court “reserve [her] rights to equitable distribution of marital property and debts.” *Id.* The husband filed a motion to dismiss the wife’s claim for equitable distribution. *Id.*

¶ 26 The trial court granted the motion to dismiss because the motion raising the equitable distribution claim was “not timely filed, and [is] therefore barred as a matter of law.” *Id.* at 434, 614 S.E.2d at 439. This Court reversed the trial court’s order, holding that “[s]ince [the wife] asserted her right to equitable distribution prior to the divorce judgment, her claim for equitable distribution was not barred as a matter of law, and the trial court erred in granting [the d]efendant’s motion to

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dismiss. N.C. Gen. Stat. § 50–11(e).” *Id.* at 435, 614 S.E.2d at 440. Just as in *Santana*, here Wife “asserted her right to equitable distribution prior to the divorce judgment [so] her claim for equitable distribution was not barred as a matter of law” based upon the time she filed her motion. *Id.* Moreover, as discussed below, although the *Santana* Court did not specifically address the propriety of bringing the equitable distribution claim in a motion instead of a complaint or counterclaim, *Santana* supports our conclusion that an equitable distribution claim can be “asserted” by a motion in the cause. *See id.*

2. *Propriety of Bringing Equitable Distribution Claim as Motion in the Cause*

¶ 27 Husband argues the equitable distribution claim must be brought by a complaint or an answer and counterclaim, not a motion in the cause. Husband interprets the language of North Carolina General Statute § 50-21(a) as limiting the scenarios when an equitable distribution action may be brought in a motion in the cause to the “two very limited and specific circumstances” enumerated in subsections (e) and (f) of North Carolina General Statute § 50-11. Thus, Husband argues that since the circumstances addressed by subsections (e) and (f) are not present in this case, Wife’s motions in the cause did not invoke the trial court’s subject matter jurisdiction over the equitable distribution claim. We must consider whether North Carolina General Statutes §§ 50-20 and 50-21 limit the mechanism for “asserting” an equitable distribution claim to a particular form of pleading – a complaint or counterclaim – but not a motion in the cause.

¶ 28 North Carolina General Statute § 50-21 sets the beginning of the time for asserting an equitable distribution claim – the date of separation – and provides how the claim may be brought as an individual claim or may be joined with other claims:

(a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, *or together with any other action brought pursuant to Chapter 50 of the General Statutes*, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (emphasis added). Subsections (e) and (f) of North Carolina General Statute § 50-11 provide for two limited exceptions when the equitable distribution claim may be asserted *after* entry of the absolute divorce judgment:

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(e) An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

(f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to equitable distribution under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered. The validity of such divorce may be attacked in the action for equitable distribution.

N.C. Gen. Stat. § 50-11(e), (f).

¶ 29 Husband's interpretation of North Carolina General Statute § 50-11 focuses on the second phrase of subsection (e), but the second phrase simply does not apply to this case, and the use of the words "motion in the cause" in that subsection implies no limitation on how the equitable distribution claim may be brought in other circumstances. Subsections (e) and (f) both address situations where the divorce judgment has already been entered so there may be no pending claims left in the absolute divorce action, but the spouse who wants to assert an equitable distribution claim in the circumstances described in subsections (e) and (f) still has the option of filing either a new action or a motion in the cause. *See* N.C. Gen. Stat. § 50-11(e), (f). These subsections address only the timing of the equitable distribution claim – allowing it to be asserted after the entry of the absolute divorce – not the type of pleading in which the claim may be asserted.

¶ 30 The statutory language is clear. *See Correll v. Division of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) ("The legislative purpose of a statute is first ascertained by examining the statute's plain language."). The first phrase of subsection (e) addresses the timing for the assertion of an equitable distribution claim in general: "An absolute divorce obtained within this State shall destroy the right of a spouse

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to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce[.]” N.C. Gen. Stat. § 50-11(e). This phrase is followed by a semicolon and the word “*except*.” *Id.* (emphasis added). The second phrase, by its express terms, notes an *exception* to the general rule stated in the first phrase that an equitable distribution claim must be “asserted” *before* the absolute divorce judgment. *Id.* That exception applies only to a defendant-spouse served by publication who failed to appear in the absolute divorce action. *Id.* Subsection (f) also notes an exception to the rule stated in the first phrase of subsection (e) that the equitable distribution claim must be asserted before the absolute divorce judgment, applicable where the trial court lacked personal jurisdiction over the “absent spouse” or jurisdiction to dispose of the property. N.C. Gen. Stat. § 50-11(f). Neither of these exceptional circumstances applies here, as Wife was personally served with the summons and complaint.

¶ 31

None of the statutes addressing equitable distribution limit the particular type of pleading for “filing” (N.C. Gen. Stat. § 50-21) or “asserting” (N.C. Gen. Stat. § 50-11) an equitable distribution claim. The equitable distribution claim may be asserted in “a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f).” N.C. Gen. Stat. § 50-21(a). When Wife filed her motion in the cause, Husband’s complaint for absolute divorce in File No. 19 CVD 224 – based on one year’s separation as provided in North Carolina General Statute § 50-6 – was pending. The absolute divorce case is an “action brought pursuant to Chapter 50 of the General Statutes.” *Id.* North Carolina General Statute § 50-21 does not limit a claim brought “together” with other Chapter 50 claims to a claim brought by a particular party. And in *Santana*, discussed above, the equitable distribution claim was asserted by a motion. *Santana*, 171 N.C. App. at 434, 614 S.E.2d at 439–40. In *Santana*, this Court noted the wife’s motion was in accord with Rule 7: “N.C. Gen. Stat. § 1A-1, Rule 7(b) (2004) (‘An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.’)” *Id.* Wife’s motion in the cause in File No. 19 CVD 224 complied with the requirements of Rule 7 and was statutorily authorized, as it was a claim filed “together with any other action brought pursuant to Chapter 50 of the General Statutes[.]” *See* N.C. Gen. Stat. § 50-21(a). And because it was filed before entry of the divorce judgment, Wife’s motion preserved her equitable distribution claim.

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3. Sufficiency of Pleading

¶ 32 Finally, this Court has noted that “a pleading requesting the court to enter an order distributing the parties’ assets in an equitable manner is sufficient to state a claim for equitable distribution.” *Coleman v. Coleman*, 182 N.C. App. 25, 28, 641 S.E.2d 332, 336 (2007) (citation omitted). We note this case does not present a question of the adequacy of the pleading of the equitable distribution claim. *Cf. id.* at 28, 641 S.E.2d at 335–36 (“Recognizing that ‘[t]here is nothing in the statute regarding the sufficiency of the pleadings to support a claim for equitable distribution[,]’ our Supreme Court also acknowledged that ‘equitable distribution is not automatic[,]’ and that a party seeking such division of marital property ‘must specifically apply for it.’” (citation omitted (alterations in original))). However, we note that Wife’s motion in the cause in File No. 19 CVD 224 was specifically based upon North Carolina General Statute § 50-20 and included detailed allegations of an equitable distribution claim, including a claim for “a share greater than fifty percent of all Marital and Divisible Property” based upon the statutory factors in North Carolina General Statute § 50-20(c). Thus, Wife’s motion in the cause in File No. 19 CVD 224 was sufficient to state a claim for equitable distribution.

IV. Conclusion

¶ 33 As to File No. 18 CVD 201, where Wife filed a motion in the cause after all claims had been fully resolved or dismissed by the parties, the effect of the voluntary dismissal without prejudice under Rule 41(a)(1) was “to terminate the action, and no suit is pending thereafter on which the court can enter a valid order.” *Collins*, 18 N.C. App. at 50, 196 S.E.2d at 286. As a result, we affirm the portion of the trial court’s order dismissing Wife’s equitable distribution claim in File No. 18 CVD 201.

¶ 34 As to File No. 19 CVD 224, where Wife’s motion in the cause asserted a claim for equitable distribution and was filed before entry of the divorce judgment, her equitable distribution claim was preserved. As a result, we reverse the portion of the trial court’s order dismissing Wife’s equitable distribution claim in File No. 19 CVD 224 and remand for further proceedings upon this claim.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ZACHARY and GORE concur.

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FRED COHEN, EXECUTOR OF THE ESTATE OF DENNIS ALAN O'NEAL, DECEASED, AND FRED COHEN, EXECUTOR OF THE ESTATE OF DEBRA DEE O'NEAL, DECEASED, PLAINTIFFS

v.

CONTINENTAL MOTORS, INC. (F/K/A TELEDYNE CONTINENTAL MOTORS, INC. AND/OR TELEDYNE CONTINENTAL MOTORS); AND AIRCRAFT ACCESSORIES OF OKLAHOMA, INC., DEFENDANTS

No. COA20-418

Filed 7 September 2021

1. Appeal and Error—interlocutory appeal—granted motion to dismiss for lack of personal jurisdiction

In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, plaintiff's interlocutory appeal from an order granting defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction was immediately appealable under N.C.G.S. § 1-277(b) and because motions to dismiss for lack of personal jurisdiction affect a substantial right.

2. Jurisdiction—personal—lack of—defense raised in responsive pleading—no waiver

In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, defendant did not waive its challenge to personal jurisdiction by allowing roughly three years to pass since plaintiff filed the complaint or by participating in limited discovery pertaining solely to the personal jurisdiction issue. Rather, defendant preserved its defense of lack of personal jurisdiction by raising it in its answer to plaintiff's complaint, pursuant to Civil Procedure Rule 12.

3. Jurisdiction—personal—specific—purposeful availment—foreign aircraft parts manufacturer—serving a North Carolina market

In an action brought against an out-of-state aircraft components manufacturer (defendant) after two North Carolina residents (decedents) died in a plane crash in North Carolina, the trial court erred in granting defendant's motion to dismiss for lack of personal jurisdiction. Defendant directly sold aircraft parts to a North Carolina-based maintenance servicer through an independent distributor in North Carolina, including the engine starter adapter that allegedly caused the crash and that another out-of-state company overhauled and sent back to the maintenance servicer, which then installed the adapter into decedents' private plane based on

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instructions that defendant directly provided in exchange for a subscription fee. Taken together, the facts indicated that defendant was actively serving a North Carolina market (albeit indirectly) for its products and, therefore, purposefully availed itself of the privileges of conducting activities in North Carolina.

Judge TYSON concurring in part and concurring in the result in part by separate opinion.

Appeal by Plaintiffs from Order entered 12 March 2020 by Judge James L. Gale in Nash County Superior Court. Heard in the Court of Appeals 12 May 2021.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Miller, III; and The Wolk Law Firm, by Michael S. Miska, pro hac vice, for plaintiff-appellant.

Armbrecht Jackson LLP, by Lacey D. Smith, Sherri R. Ginger, and Timothy A. Heisterhagen; and Williams Mullen, by Elizabeth D. Scott, for defendant-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, Christopher R. Kiger, and Amelia L. Serrat, for amicus curiae North Carolina Association of Defense Attorneys.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Fred Cohen (Plaintiff), Executor of the Estates of Debra Dee O'Neal and Dennis Alan O'Neal (the O'Neals), appeals from an Order granting a Motion to Dismiss for Lack of Personal Jurisdiction entered in favor of Continental Motors, Inc. (CMI). The Record before us tends to reflect the following:

The Accident

¶ 2 At approximately 12:30 p.m. on 31 March 2013, the O'Neals, residents of Blounts Creek, North Carolina, took off from Wilkes County Airport in North Wilkesboro, North Carolina, flying a Lancair LC42-550FG (the Aircraft) destined for Warren Field Airport in Washington, North Carolina. The O'Neals were licensed and experienced aircraft pilots;

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Debra O'Neal piloted the Aircraft. After the Aircraft climbed to 5,000 feet, at 12:46 p.m. "the pilot declared an emergency and reported[:] . . . 'low fuel pressure – engine's quitting.' " "[An] air traffic controller vectored the airplane toward" Smith Reynolds Airport in Winston-Salem. "[D]uring the descent[,] the pilot reported smoke in the cockpit and subsequently reported that the engine was 'barely' producing power." Data from the accident would later reveal the engine had lost power after losing oil pressure. At 12:50 p.m., approximately three miles west of Smith Reynolds Airport, the Aircraft made a forced landing, collided with trees and terrain, and burst into flames, killing both O'Neals. Plaintiff was appointed as the Executor of the O'Neals respective Estates.

Continental Motors, Inc.

¶ 3 CMI "is a Delaware corporation with a principal place of business in Mobile, Alabama." "CMI is engaged in the business of designing, manufacturing, and selling aircraft engines and component parts." According to its then-Director of Certification and Airworthiness, Michael E. Ward (Ward), during deposition, "C[MI] markets to the flying public at large . . . [and] ha[s] an international market." In fact, CMI claims, "[f]rom 2010 to 2013, [it] sold parts in all fifty United States[,] " including North Carolina, "as well as in other countries."

¶ 4 CMI's business model involves "sell[ing] through distribution, so [it] ha[s] distributors that purchase [CMI] parts and sell [them] into the aviation public." Thus, from 2010 to 2013, "distributors would order parts from C[MI], and the[] [parts] would be shipped either to the distributor or drop-shipped to the customer at the distributor's request." "Triad Aviation" (Triad), "located in Burlington, North Carolina . . . operated as a distributor for C[MI] parts from 2010 to 2013." More specifically, "[f]rom May 2010 to August 2013, C[MI] engaged in 2,948 sales of component parts with a total value of \$3,933,480.65 through Triad" North Carolina "orders were taken from Triad . . . , and the parts were delivered either to Triad or drop shipped at [customers'] instructions."¹

¶ 5 During the 2010-2013 period, Air Care Aviation Services (Air Care), "a maintenance and avionics provider" headquartered and with principal place of business in North Carolina, sold and serviced CMI components. CMI made "no direct sales to Air Care"; however, "Triad . . . purchased

1. As Timothy J. Padgett (Padgett), then-Director of Maintenance at Air Care Aviation Services, confirmed during his deposition, "if [someone] needed to get . . . a C[MI] part for [their] plane, [they]'d call up . . . Triad" or another distributor known as "Aviall . . . to get it[.]" However, "if [customers] need[ed] to troubleshoot a problem with a [CMI] component . . . [they]'d have to go to C[MI] for that."

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approximately twelve (12) products from C[MI] that were drop-shipped to Air Care from approximately May 2010 to August 2013.” Although it does not appear it was standard practice to do so at the time, “on occasion” Air Care would call CMI for support.

¶ 6 CMI “[wa]s the Type Certificate Holder for IO-550-N series engines such as the” engine inside the Aircraft, “and provide[d] continued airworthiness instructions for that engine series in compliance with Federal Aviation Administration . . . regulations[.]” During the 2010-2013 period, CMI’s “in-house[.]” “online technical library and the service instructions it contained were available to service centers like Air Care through a subscription to C[MI]’s FBO² Services Link.” “To subscribe to C[MI]’s FBO Service[s] Link, a subscriber would go to C[MI]’s website to create a profile and pay a subscription fee.” “Once that fee was paid, the computer program would authorize the subscription, and [subscribers] would have access to the publications.” CMI would then “post[] service updates to service bulletins in its online library and notif[y] subscribers of those updates through e-mail broadcasts.” Through this technical library, “subscribers would have access to manuals, overhaul manuals, [and] maintenance manuals, [all] for [the] subscription fee.” Additionally, “[w]hen an engine ships from C[MI], there is a log-book package that goes with the engine. And as part of that log-book package there is a compact disc that has the maintenance manuals for that engine as well as some other information.”³ In summary, during the 2010-2013 period, all this information was made available to subscribers directly from CMI. CMI “had fourteen North Carolina subscribers[.]” including Air Care.

The Aircraft

¶ 7 At the time of the crash, the Aircraft was privately owned by the O’Neals and registered in North Carolina. Prior to the O’Neals’ purchase of the Aircraft in 2010, it had been owned by at least one other owner. The Aircraft, manufactured in 2003, “was equipped with a

2. According to the FAA, FBO stands for “Fixed Base Operator.” Federal Aviation Administration, *Airport Acronyms and Abbreviations* 43, <https://www.faa.gov/airports/resources/acronyms/#f> (last visited July 21, 2021). “A Fixed Base Operator engages in and furnishes a full range of aeronautical products, services and facilities to the public[.]” Duluth International Airport, *Rules and Standards*, (June 2014) <https://www.lsc.edu/wp-content/uploads/DLH-Rules-and-Standards.pdf>.

3. According to Ward, CMI also had, “from September 2013 to May of 2015 . . . one employee, a service representative, who was based out of North Carolina, although his duties were unrelated to this matter.”

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C[MI] IO-550N, 310-horsepower engine.” “CMI designed and manufactured the IO-550-N2B engine . . . at its facility in Mobile, Alabama.” “The [e]ngine was sold and shipped to The Lancair Company . . . in Bend, Oregon on or around March 31, 2002.” “The [e]ngine was [then] installed in the . . . [A]ircraft[.]”

¶ 8 “The [e]ngine, as sold by CMI to Lancair, was assembled with a starter adapter⁴ . . . in accordance with CMI’s FAA-approved Type Design Data for the [e]ngine.” “[T]h[is] original starter adapter . . . assembled to the [e]ngine by CMI was removed and replaced with a different model starter adapter . . . sometime while the Aircraft and [e]ngine were at Lancair’s facility in Bend[.]”

¶ 9 The O’Neals were customers of Air Care, and Air Care provided service and maintenance for the Aircraft. As part of its servicing and maintenance of the Aircraft, “Air Care installed a third starter adapter” (the Starter Adapter), “which was on the [e]ngine at the time of the accident[.]” Air Care “purchased the Starter Adapter from [d]efendant Aircraft Accessories of Oklahoma, Inc.” (Aircraft Accessories) “as an overhauled starter adapter unit on or around January 29, 2013.” This overhauled replacement was made because the second starter adapter “was slipping.”⁵ The third and final Starter Adapter was a CMI component, overhauled by Aircraft Accessories.

¶ 10 Air Care mechanic Justin Pearson (Pearson) installed the Starter Adapter “on or around February 11, 2013.” Pearson used CMI’s “maintenance manual to reinstall the engine and the engine mounts,” as well as to “reinstall[] [the] A/C mount bracket, A/C compressor, air oil separat[o]r and starter with new O-ring” In fact, Air Care’s mechanics at large “were expected to” use CMI’s online library through Air Care’s subscription when Air Care inspectors determined it was necessary for the mechanics to do so. Furthermore, “[t]he service instructions pertaining to the installation of the . . . Starter Adapter were in C[MI]’s IO-550 Permold Series Engine Maintenance and Overhaul Manual” As to whether the Starter Adapter was installed pursuant to CMI’s manual, Timothy J. Padgett (Padgett), Director of Maintenance at Air Care, testified the following in deposition:

4. According to Padgett, a starter adapter is “a component that resides on the back of the engine which engages with the drive of the engine for the starter.”

5. During his deposition, Padgett testified “slipping” “means that when your starter’s engaged, that the adapter is not turning the engine over.”

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Q. . . . Do you expect that Air Care and [] Pearson would have followed the maintenance instructions with respect to the installation of the [S]tarter [A]dapter that C[MI] provided?

A. Yes.

Q. Do you believe that you used anybody's installation instructions for that [S]tarter [A]dapter?

A. No.

Q. In fact, do you believe [Pearson] solely followed the maintenance and installation procedures set forth in the C[MI] manual?

A. Yes.

Q. Is it Air Care's practice to utilize this manual as far as what instructions it uses in performing maintenance?

A. Yes.

Q. Do you believe that [] Pearson would have inspected the [S]tarter [A]dapter that was received from Aircraft Accessories of Oklahoma in accordance with the procedures enumerated in Section 10 of the C[MI] manual?

A. I believe so.

Q. Do you believe [] Pearson inspected it to see if there was a plug installed that's been identified in the parts diagram as either number 54 or number 55?

A. I would believe so.

Q. And when you signed off on that logbook entry, did you believe that the installation had been done in accordance with the C[MI] instructions?

A. Yes.

Plaintiff's Suit

¶ 11 On 12 March 2015, Plaintiff filed the Complaint on behalf of the Estates against CMI and Air Care, among others.⁶ Against CMI, Plaintiff alleged claims including: Strict Liability; Negligence; Breach of Express and Implied Warranties; Negligent Misrepresentation; Fraud; "Recklessness, Outrageousness, Willful and Wanton Conduct";

6. The Complaint was originally filed in Wilson County; venue was then changed to Nash County.

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and a claim under N.C. Gen. Stat. Section 75-1.1. “[The] claims against C[MI] are predicated upon two theories of liability—that the . . . Starter Adapter was subject to a design defect, and that the Service Manual upon which Air Care allegedly relied when installing the . . . Starter Adapter was defective.”

¶ 12 On 22 May 2015, CMI filed its Answer, which included as an affirmative defense: “[t]hese Defendants assert that this Court does not have personal jurisdiction over these Defendants.” On 2 November 2018, after several years and a few exchanges of discovery, CMI filed a Motion to Dismiss the Complaint under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure for Lack of Personal Jurisdiction. In its Motion, CMI, in relevant part, argued the following:

Neither the engine, nor the [S]tarter [A]dapter in question, was designed, manufactured, or sold by CMI in North Carolina. Instead, the engine and the [S]tarter [A]dapter were designed and manufactured in Alabama. The engine, with its original starter adapter, was then sold from CMI’s factory in Mobile to Lancair in Bend, Oregon. The original starter adapter was then later removed by third parties and eventually replaced with an overhauled part provided by third parties. The engine and accident [S]tarter [A]dapter ended up in North Carolina not through CMI’s actions, but rather through the unilateral actions of other parties.

. . . .

CMI is not currently registered or otherwise licensed to do business in North Carolina, although it was registered with the North Carolina Secretary of State . . . for a brief period from November 2013 to August 2015. . . .

In the last five years, CMI has not maintained offices, places of business, post office boxes, or telephone listings in North Carolina; has had no real estate, bank accounts, or other interests in property in North Carolina; did not incur any obligation to pay, and has not paid, income taxes in North Carolina; did not have any warehouses, repair stations, sales agents, dealers, or other sales representatives located in North Carolina on a permanent or regular basis; has

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not conducted any regular or ongoing advertising, solicitation, marketing, or other sales promotions directed toward residents of North Carolina; and has not contracted to do business with any resident of North Carolina for purposes of distributing, servicing or marketing goods

¶ 13 The trial court heard arguments on CMI's Motion on 10 September 2019, during which the parties submitted affidavits and depositions in support of their respective arguments. The trial court further permitted limited additional discovery to be conducted post-hearing on the issue of personal jurisdiction and invited the parties to submit supplemental briefing. "After supplemental materials and briefs were submitted, the [trial] [c]ourt heard further oral argument on February 6, 2020."

¶ 14 In an Order dated 12 March 2020, the trial court granted CMI's Motion to Dismiss for Lack of Personal Jurisdiction, concluding, in pertinent part: "C[MI] has not waived its defense to personal jurisdiction and is not estopped from asserting it;" and "Plaintiff has not demonstrated that the exercise of specific jurisdiction over C[MI] is appropriate by a preponderance of evidence" With respect to the issue of waiver, the trial court reasoned, "[a]cknowledging that North Carolina's appellate courts have not addressed at length the issue of post-objection waiver[.]" that "[i]n most federal cases, the courts have required more than the passage of time and participation in limited discovery to find waiver" and "[i]n circumstances where waiver is found, the defendant has usually fully participated in the merits of the litigation or sought affirmative relief from the court." Thus, the trial court concluded CMI, after raising the defense of lack of personal jurisdiction in its Answer, "ha[d] participated only in limited written discovery bearing on matters related to specific jurisdiction and ha[d] requested no affirmative relief from the [c]ourt[.]"

¶ 15 Next, on the merits of CMI's Motion to Dismiss for Lack of Personal Jurisdiction, the trial court supported its conclusion with the following reasoning:

"To determine whether it may assert specific jurisdiction over a defendant, the court considers '(1) the extent to which the defendant "purposefully availed" itself of the privilege of conducting activities in the State; (2) whether the plaintiff[s] claims arise out of those activities directed at the State; and (3) whether

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the exercise of personal jurisdiction would be constitutionally “reasonable.” ’ ”

. . . .

While C[MI]’s broader contacts with North Carolina may be pertinent to the final question of whether exercising personal jurisdiction would be reasonable, the [c]ourt concludes that C[MI]’s characterization of the purposeful availment inquiry is consistent with controlling case law

“The United State[s] Supreme Court has emphasized that ‘specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.’ ”

. . . .

First, even if the [c]ourt assumes without deciding that C[MI]’s distributor relationships and sales in North Carolina are purposeful contacts with the State adequate to satisfy specific jurisdiction over claims arising from those contacts, those are unrelated to Plaintiff’s claims against C[MI] in this litigation.

. . . .

Second, the Court agrees with C[MI] that the specific acts connected to the accident upon which Plaintiff relies do not support a finding that C[MI] purposely availed itself of doing business in North Carolina regarding those acts. Specifically, Plaintiff relies on C[MI]’s Service Manual and the FBO Services Link through which the Service Manual was made available to Air Care.

. . . .

A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction.

The trial court then granted CMI’s Motion. Plaintiff filed written Notice of Appeal on 9 April 2020.

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Appellate Jurisdiction

¶ 16 [1] “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Here, the Order granting CMI’s Motion to Dismiss for Lack of Personal Jurisdiction is interlocutory because it does not dispose of the case in that it leaves Plaintiff’s claims against Aircraft Accessories still pending for resolution.⁷ See *Peterson v. Dillman*, 245 N.C. App. 239, 242, 782 S.E.2d 362, 365 (2016) (“An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.” (citation omitted)). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citations omitted). However, by statute, “[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.” N.C. Gen. Stat. § 1-277(b) (2019); see also § 7A-27(b)(4) (“[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any . . . order or judgment of the superior court from which an appeal is authorized by statute.”).

¶ 17 Furthermore, “immediate appeal is available from an interlocutory order or judgment which affects a ‘substantial right.’” *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (citations omitted); see also N.C. Gen. Stat. § 1-277(a) (“An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding”); see also § 7A-27(b)(3)(a) (“[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom an interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right.”). This Court has concluded “motions to

7. In an earlier appeal in this case, this Court affirmed the trial court’s denial of Aircraft Accessories’ Motion to Dismiss for Lack of Personal Jurisdiction, holding “the trial court did not err by concluding that Aircraft Accessories had sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction over it without violating the due process clause.” *Cohen v. Cont’l Motors, Inc.*, 253 N.C. App. 407, 799 S.E.2d 72 (2017) (unpublished) (slip op. at *11).

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dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable.” *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006). Accordingly, immediate appeal is appropriate in this case.

Issues

- ¶ 18 The relevant issues on appeal are whether the trial court erred by granting CMI’s Motion to Dismiss for Lack of Personal Jurisdiction on the bases: (I) CMI had not waived its personal jurisdiction challenge; and (II) the trial court lacked personal jurisdiction over CMI.

Analysis

- ¶ 19 “The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court.” *Banc of Am. Secs. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).

Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

Id. In this case, the parties submitted dueling affidavits and other discovery materials in support of their respective jurisdictional arguments; therefore, this case falls into the third category. *See id.*

- ¶ 20 If the parties “submit dueling affidavits[,] . . . the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions.” *Id.* at 694, 611 S.E.2d at 183 (second and third alterations in original; citations and quotation marks omitted); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) (“If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits.” (citation omitted)). In addition, where “defendants submit some form of evidence to counter plaintiffs’ allegations, those allegations can no longer be taken as true or controlling and plaintiffs cannot rest on the allegations of the complaint.” *Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218 (citations omitted). Where the trial court elects to decide

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the motion to dismiss on competing affidavits, “the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. Of course, this procedure does not alleviate the plaintiff’s ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.” *Id.* at 615, 532 S.E.2d at 217 (citations omitted). “If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror.” *Banc of Am. Secs. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (alterations, citation, and quotation marks omitted).

¶ 21 Thus, in this context, “[t]he standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]” *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (second alteration in original; quotation marks omitted) (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). “We review *de novo* the issue of whether the trial court’s findings of fact support its conclusion of law that the court has personal jurisdiction over defendant.” *Id.* (citation omitted).

I. Waiver

¶ 22 [2] Plaintiff argues the trial court erred in concluding CMI had not waived its defense of Lack of Personal Jurisdiction by way of its “long participation in litigation on the merits” and, thus, in allowing CMI to raise this challenge in its Motion to Dismiss for Lack of Personal Jurisdiction.

¶ 23 “Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, *except*[,]” among others, “[l]ack of jurisdiction over the person[,]” which “may at the option of the pleader be made by motion . . .” N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (emphasis added). Rule 12(b) further provides:

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

§ 1A-1, 12(b). Then, per Rule 12(h),

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[a] defense of lack of jurisdiction over the person . . . is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

§ 1A-1, Rule 12(h)(1).

¶ 24 Here, CMI raised the defense of Lack of Personal Jurisdiction in its Answer to Plaintiff's Complaint. Thus, pursuant to Rule 12 of our statutory Rules of Civil Procedure, because CMI raised this defense in a responsive pleading, CMI's jurisdictional challenge was not waived. *See id.*; *see also Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604 (1996) ("A defendant . . . cannot submit himself to the jurisdiction of the court or waive the defense of lack of personal jurisdiction by filing an answer which contains the defense of lack of personal jurisdiction . . . and/or engaging in discovery[.]" (citations omitted)). Accordingly, CMI's Motion to Dismiss for Lack of Personal Jurisdiction was not improper, and the trial court did not err in concluding CMI had not waived its jurisdictional challenge.

II. Personal Jurisdiction

¶ 25 **[3]** The North Carolina Supreme Court has held

that a two-step analysis must be employed to determine whether a non-resident defendant is subject to the *in personam* jurisdiction of our courts. First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.

Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citations omitted). In this case, the parties appear to agree North Carolina's "long-arm" statute is applicable to this case. Rather, the parties focus on the question of whether the exercise of personal jurisdiction in this case is consistent with the Due Process Clause of the Fourteenth Amendment.

¶ 26 The Supreme Court of the United States recently addressed the issue of a state court's authority to assert personal jurisdiction over an out-of-state Defendant under the Fourteenth Amendment in *Ford Motor Co.*

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v. Montana Eight Jud. Dist. Ct., ___ U.S. ___ (2021).⁸ “The Fourteenth Amendment’s Due Process Clause limits a state court’s power to exercise jurisdiction over a defendant.” *Id.* at ___ (slip op. at *4). Our courts “recogniz[e] two kinds of personal jurisdiction: general . . . jurisdiction and specific . . . jurisdiction.” *Id.* at ___ (slip op. at *5) (citing *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011)). Specific jurisdiction “covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name ‘purposeful availment.’ ” *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). “The defendant . . . must take ‘some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.’ ” *Id.* (bracket in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1985)). “The contacts must be the defendant’s own choice and not ‘random, isolated, or fortuitous.’ ” *Id.* at ___ (slip op. at *6) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). “The[se] [contacts] must show that the defendant deliberately ‘reached out beyond’ its home—by, for example, ‘exploit[ing] a market’ in the forum State or entering a contractual relationship centered there.” *Id.* (second bracket in original) (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). “Yet even then . . . the forum State may exercise jurisdiction in only certain cases. The plaintiff’s claims . . . ‘must arise out of or relate to the defendant’s contacts’ with the forum.” *Id.* (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 582 U.S. ___, ___, 137 S.Ct. 1773, 1780 (2017)). “[P]ut just a bit differently, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.” *Id.* (second bracket in original; quotation marks omitted) (quoting *Bristol-Myers*, 582 U.S. at ___, 137 S.Ct. at 1780).

¶ 27

In *Ford*, the action arose out of two distinct vehicle accidents, in Montana and Minnesota respectively, involving two Ford vehicles. *Id.* at ___ (slip op. at *2). Ford, the defendant, “a global auto company . . . incorporated in Delaware and headquartered in Michigan[,]” conceded “it does substantial business in Montana and Minnesota[,] that it actively seeks to serve the market for automobiles and related products in those [s]tates[,]” and that “it ha[d] purposefully avail[ed] itself of the privilege of conducting activities in both places.” *Id.* at ___ (slip op. at *2, 7-8) (last bracket in original; quotation marks omitted). However,

8. We acknowledge that the trial court did not have the benefit of this decision at the time it ruled on CMI’s Motion.

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Ford argued “those activities d[id] not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford’s view, the needed link [had to] be causal in nature[,]” claiming “[j]urisdiction attaches only if the defendant’s forum conduct *gave rise* to the plaintiff’s claims.” *Id.* at ____ (slip op. at *8) (quotation marks omitted).

¶ 28

The Supreme Court disagreed:

None of our precedents has suggested that only a strict causal relationship between the defendant’s in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit “arise out of *or relate to* the defendant’s contacts with the forum.” The first half of that standard asks about causation; but the back half, after the “or,” contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase “relate to” incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, *we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff’s claim came about because of the defendant’s in-state conduct.*

Id. at ____ (slip op. at *8-9) (last emphasis added; citations omitted). The Supreme Court then drew the following example:

[I]ndeed, this Court has stated that specific jurisdiction attaches in cases identical to the ones here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. But in so doing, we contrasted the dealer’s position to that of two other defendants—Audi, the car’s manufacturer, and Volkswagen, the car’s nationwide importer (neither of which contested jurisdiction):

“[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts

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of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.”

Or said another way, if Audi and Volkswagen’s business deliberately extended into Oklahoma (among other States), then Oklahoma’s courts could hold the companies accountable for a car’s catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus “purposefully avail[ing] itself” of the Oklahoma auto market “has clear notice” of its exposure in that State to suits arising from local accidents involving its cars. And the company could do something about that exposure: It could “act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State.”

Id. at ____ (slip op. at *9-10) (all but first alterations in original; citations omitted). Then, the Supreme Court reasoned:

Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong “relationship among the defendant, the forum, and the litigation”—the “essential foundation” of specific jurisdiction. That is why this Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an illustration—even a paradigm example—of how specific jurisdiction works.

Id. at ____ (slip op. at *12) (citations omitted).

The fact pattern before us in the instant case is analogous. Here, CMI, by its employee’s own admission, “markets to the flying public at large . . . [and] ha[s] an international market.” In fact, “[f]rom 2010 to 2013, C[MI] sold parts in all fifty United States as well as in other countries[,]” which included the forum state, North Carolina. Although CMI

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did not sell components to individual aircraft owners themselves, it actively maintained a business model that operated through independent distributors—including Triad, based in North Carolina. This made it so that if aircraft owners in North Carolina needed to purchase CMI parts, they would do so through Triad. Furthermore, during the time frame of the accident, CMI made it so that individuals across its international market, including those in North Carolina, could access its online database for a fee, thus drawing a benefit to itself from the “privilege of conducting activities” with North Carolina subscribers. *See id.* at ____ (slip op. at *5). One such North Carolina subscriber, Air Care, was in fact “expected to” rely on the information CMI provided through its subscriptions to operate on any aircrafts bearing CMI parts. In fact, even presuming *arguendo* Pearson, the Air Care mechanic, did not rely on CMI instructions to install the Starter Adapter, the evidence clearly indicates Pearson did indeed rely on CMI literature to operate on other components inside the O’Neals’ Aircraft. The facts, thus, paint a clear picture: at the time of the accident, CMI “serve[d] a market for a product in the forum [s]tate” of North Carolina. *See id.* at ____ (slip op. at *9).

¶ 30 Consistent with CMI’s business model, CMI’s Starter Adapter was overhauled by Aircraft Accessories, moved to Triad (in North Carolina), then to Air Care (in North Carolina), and was finally installed in the O’Neals’ Aircraft (in North Carolina). Thereafter, CMI’s product allegedly malfunctioned in North Carolina, causing the accident. Applying the reasoning of *Ford* to this case: “the sale of [CMI’s] product . . . [wa]s not simply an isolated occurrence, but ar[o]se[] from the efforts of [CMI] to serve, *directly or indirectly*, the [North Carolina] market” *See id.* at ____ (slip op. at *10) (emphasis added). In fact, “[f]rom May 2010 to August 2013, C[MI] engaged in 2,948 sales of component parts with a total value of \$3,933,480.65” in North Carolina, serving the North Carolina market indirectly by operating “through Triad” Thus, “it is not unreasonable to subject [CMI] to suit in [North Carolina]” since “its allegedly defective [Starter Adapter] has there been the source of injury to its owner[s],” the O’Neals. *See id.*

¶ 31 Indeed, “this exact fact pattern (a resident-plaintiff sues a global [aviation] company, extensively serving the state market . . . for an in-state accident)” also effectively functions “as an illustration—even a paradigm example—of how specific jurisdiction works.” *See id.* at ____ (slip op. at *2). Therefore, applying *Ford* to the particular facts of this case, exercise of personal jurisdiction in North Carolina over CMI does not offend the Due Process Clause of the Fourteenth Amendment. Consequently, in light of the *Ford* opinion issued after the trial court’s

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Order in this case, we must conclude the trial court erred in granting CMI's Motion to Dismiss for Lack of Personal Jurisdiction on this basis.

Conclusion

¶ 32 Accordingly, for the foregoing reasons, we affirm in part and reverse in part the trial court's Order granting CMI's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction. We remand this matter to the trial court for purposes of permitting the parties to pursue further proceedings on the merits of this litigation.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge WOOD concurs.

Judge TYSON concurs in part and concurs in the result in part by separate opinion.

TYSON, Judge, concurring in part and concurring in the result in part.

¶ 33 I fully concur with the majority's analysis and conclusion that Continental Motors, Inc. ("CMI") properly raised the defense of lack of personal jurisdiction in its Answer to Plaintiff's Complaint. Because this defense was raised in its first responsive pleading, CMI's jurisdictional challenge was not waived. I also agree and concur with the conclusion this interlocutory appeal is properly before this Court.

¶ 34 I concur in the result with the majority's opinion holding CMI can be haled into North Carolina's courts consistent with the Due Process Clause of the Fourteenth Amendment and North Carolina's long-arm jurisdiction statute. I write separately to catalog and limit the analysis on specific personal jurisdiction to CMI's activities within North Carolina. The trial court's order granting CMI's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction, entered prior to the Supreme Court of the United States' decision in *Ford*, is properly affirmed in part, reversed in part, and remanded.

¶ 35 CMI's Motion to Dismiss the Complaint, under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure for Lack of Personal Jurisdiction, argued, in relevant part, the following:

Neither the engine, nor the [S]tarter [A]dapter in question, was designed, manufactured, or sold by CMI in North Carolina. Instead, the engine and the

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[S]tarter [A]dapter were designed and manufactured in Alabama. The engine, with its original starter adapter, was then sold from CMI's factory in Mobile to Lancair in Bend, Oregon. The original starter adapter was then later removed by third parties and eventually replaced with an overhauled part provided by third parties. The engine and accident [S]tarter [A]dapter ended up in North Carolina not through CMI's actions, but rather through the unilateral actions of other parties.

....

CMI is not currently registered or otherwise licensed to do business in North Carolina, although it was registered with the North Carolina Secretary of State . . . for a brief period from November 2013 to August 2015

In the last five years, CMI has not maintained offices, places of business, post office boxes, or telephone listings in North Carolina; has had no real estate, bank accounts, or other interests in property in North Carolina; did not incur any obligation to pay, and has not paid, income taxes in North Carolina; did not have any warehouses, repair stations, sales agents, dealers, or other sales representatives located in North Carolina on a permanent or regular basis; has not conducted any regular or ongoing advertising, solicitation, marketing, or other sales promotions directed toward residents of North Carolina; and has not contracted to do business with any resident of North Carolina for purposes of distributing, servicing or marketing goods

¶ 36

The trial court granted CMI's Motion to Dismiss for Lack of Personal Jurisdiction, and properly supported its conclusion with the following reasoning:

To determine whether it may assert specific jurisdiction over a defendant, the court considers "(1) the extent to which the defendant 'purposefully availed' itself of the privilege of conducting activities in the State; (2) whether the plaintiff[']s claims arise out of those activities directed at the State; and (3) whether

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the exercise of personal jurisdiction would be constitutionally ‘reasonable.’ ”

....

While C[MI]’s broader contacts with North Carolina may be pertinent to the final question of whether exercising personal jurisdiction would be reasonable, the [c]ourt concludes that C[MI]’s characterization of the purposeful availment inquiry is consistent with controlling case law

The United State[s] Supreme Court has emphasized that “specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.”

....

First, even if the [c]ourt assumes without deciding that C[MI]’s distributor relationships and sales in North Carolina are purposeful contacts with the State adequate to satisfy specific jurisdiction over claims arising from those contacts, those are unrelated to Plaintiff’s claims against C[MI] in this litigation.

....

Second, the [c]ourt agrees with C[MI] that the specific acts connected to the accident upon which Plaintiff relies do not support a finding that C[MI] purposely availed itself of doing business in North Carolina regarding those acts. Specifically, Plaintiff relies on C[MI]’s Service Manual and the FBO Services Link through which the Service Manual was made available to Air Care.

....

A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction.

I. Personal Jurisdiction

After the trial court’s order was entered, the Supreme Court of the United States issued a relevant decision. In order for a forum to assert specific personal jurisdiction over a non-resident, “there must be an

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affiliation between the forum and the underlying controversy, principally an activity or an occurrence that takes place in the forum state and is therefore subject to the State's regulation." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, __ U.S. __ (2021) (slip op. at *6) (citation omitted). The Supreme Court of the United States has also held the suit must "arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 582 U.S. __, __, 198 L. Ed. 2d. 395, 403 (2017) (emphasis supplied).

¶ 38 In *Ford*, the Supreme Court recently interpreted this quote to mean:

The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. *That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. . . .*, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct.

Ford Motor Co., __ U.S. at __ (slip op. at *8-9) (emphasis supplied).

¶ 39 In a footnote, the majority's opinion in *Ford* re-affirms a state court *does not* necessarily have jurisdiction over a nationwide corporation for any claim, no matter how unrelated the corporation's activities are to the forum state. *Id.* at __ (slip op. at *9, n.3). Without this distinction and objective delineations, limitations on specific personal jurisdiction for non-forum "nationwide companies" would be destroyed. Very few nationwide companies boast the size, scope, scale, pervasiveness, and ubiquitous presence across national and international markets Ford has achieved.

¶ 40 Here, CMI admits it "markets to the flying public at large" and has sold parts in all fifty states. CMI allegedly participated in 2,948 sales of parts transactions through independent distributors, which were eventually sold to North Carolina, and which totaled \$3,933,480.65 in revenue in a three-year period preceding the accident, including sales of new models of the starter adapter at issue. The specific personal jurisdiction over non-forum defendant analysis partially "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co.*, __ U.S. at __, 198 L. Ed. 2d at 403.

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¶ 41 This Court has upheld specific personal jurisdiction over a non-forum company, which availed itself of conducting business in North Carolina after a company mailed out 1,937 sales catalogs in North Carolina in a season, directly sold products to 239 North Carolina residents, and generated over \$12,000 in sales. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114-15, 516 S.E.2d 647, 650-51 (1999).

¶ 42 In the complaint, Plaintiff alleged, “the defects in the aircraft engine existed at the time the engine and engine assemblies were built and sold, manufactured and designed.” None of those actions occurred in North Carolina.

¶ 43 Plaintiff also alleges, and Defendant denies, the starter adapter was subject to a design defect, and the service manual available to Air Care was incorrect. None of those actions occurred in North Carolina.

¶ 44 The Lancair LC42-550FG aircraft over its life was equipped with at least three different starter adapters. The first starter adapter was replaced at the aircraft manufacturer's factory without explanation, prior to the original sale and delivery, and long before the O'Neals' subsequently acquiring the aircraft. None of those actions occurred in North Carolina.

¶ 45 The second starter adapter “was slipping,” which necessitated the replacement. The third starter adapter was not sold by CMI. It was sold from and by Aircraft Accessories of Oklahoma, who sold the remanufactured and overhauled part to Air Care in North Carolina, who ultimately installed the part on the O'Neals' aircraft based in North Carolina.

¶ 46 The part CMI had originally manufactured was altered, overhauled, and remanufactured by others without any links to or oversight by CMI. This part was identified by investigators as a precipitating cause of the crash and would not have entered North Carolina to be installed on the plane, but for the Aircraft Accessories of Oklahoma company. The Supreme Court of the United States, in *Ford*, emphasizes “some relationships will support jurisdiction without a causal showing.” *Id.* at __ (slip op. at *8). Neither of the two vehicles involved in the collisions in *Ford*, were originally sold through a Ford Motor Company dealer network in the forum jurisdictions. Subsequent purchasers brought the vehicles into the respective forum states. Ford Motor Company neither designed nor manufactured the vehicles in the forums.

¶ 47 It must be noted that the phrase “relate to,” and its meaning from *Ford* “incorporates real limits.” *Id.* at __ (Alito, J., concurring) (slip op. at *4). The majority's opinion in *Ford* also cautions that “does not mean

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[279 N.C. App. 123, 2021-NCCOA-449]

anything goes. In the sphere of specific jurisdiction, the phrase ‘relate to’ incorporates real limits, as it must to adequately protect defendants foreign to a forum.” *Ford Motor Co.*, __ U.S. at __ (slip op. at *8-9).

¶ 48

The majority’s opinion in *Ford* does not articulate any guardrails or outer limits for lower courts to follow when evaluating whether due process concerns prevent a court from establishing specific personal jurisdiction over a non-forum defendant. *See id.* at __ (Gorsuch, J., concurring) (slip op. at *3).

Where this leaves us is far from clear. For a case to “relate to” the defendant’s forum contacts, the majority says, it is enough if an “affiliation” or “relationship” or “connection” exists between them. But what does this assortment of nouns *mean*? Loosed from any causation standard, we are left to guess. The majority promises that its new test “does not mean anything goes,” but that hardly tells us what does. In some cases, the new test may prove more forgiving than the old causation rule. But it’s hard not to wonder whether it may also sometimes turn out to be more demanding. Unclear too is whether, in some cases like that, the majority would treat causation and “affiliation” as alternative routes to specific jurisdiction or whether it would deny jurisdiction outright.

Id. (internal citations omitted).

¶ 49

Multiple cases remain undisturbed where the Supreme Court of the United States articulated and delineated significant due process protections from assertion of personal jurisdiction over a non-forum defendant: *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 921-929, 180 L. Ed. 2d 796, 804-809 (2011) (tire manufacturer who manufactured tires in Turkey, did not import the tire model into forum state, nor primarily distribute the tire model in the United States, could not be haled into forum for incident occurring in France despite parent company having large factory in forum); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298-299, 62 L. Ed. 2d 490, 502 (1980) (“mere unilateral activity” of plaintiffs to bring car into forum did not establish jurisdiction because defendants did not have minimum “contacts, ties or relations”); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416-19 80 L. Ed. 2d 404, 412-14 (1984) (forum did not acquire jurisdiction over Columbian corporation where that corporation contracted

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in Peru to provide services, even though some goods were purchased in and some training occurred in forum); *Daimler AG v. Bauman*, 571 U.S. 117, 139, 187 L. Ed. 2d 624, 641 (2014) (forum may acquire general personal jurisdiction when a defendant conducts an overwhelming amount of activity within the forum); and, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487, 85 L. Ed. 2d 528, 550 (1985) (forum's exercise of jurisdiction not fundamentally unfair where corporation had substantial and continuing relationship with plaintiff-company's headquarters in the forum, contract documents provided notice and the course of dealing between the parties provided that corporation could be subject to suit in forum).

¶ 50 Here, while CMI does not approach the nationwide size, scope, and scale of Ford, its activities "related to" North Carolina more align with the facts in *Ford* than those of the decoy maker in Maine selling his hand-carved unique products online across state lines as memorialized in Justice Gorsuch's concurring opinion in *Ford. Id.* at __ (Gorsuch, J., concurring) (slip op., at 4).

II. Internet Based Service Manual

¶ 51 The trial court found CMI "has not conducted any regular or ongoing advertising, solicitation, marketing, or other sales promotions directed toward residents in North Carolina." In *Havey v. Valentine*, 172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647-48 (2005), our Court adopted the United States Court of Appeals for the Fourth Circuit rule for determining whether an internet website can become the basis for the exercise of personal jurisdiction in the forum in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002). *ALS Scan, Inc.* adopted the analysis from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997).

¶ 52 In *Havey*, this Court held:

A State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include

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directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State. *When a website is neither merely passive nor highly interactive, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs.*

Havey, 172 N.C. App. at 816-17, 616 S.E.2d at 647-48 (emphasis supplied) (internal citations, quotation marks, and alterations omitted).

¶ 53 CMI's website is an interactive informational website. The website provides an "online technical library" where subscribers can "access instructions and manuals." Fixed-base operators and service centers, like Air Care could go to CMI's website and pay a subscription fee to access the "online technical library." CMI had 14 paid subscribers in North Carolina. CMI posted updates to this manual and notified its subscribers of the updates. While Air Care maintained a subscription to the manual, it is unknown whether their technicians accessed or referenced the manual while installing the remanufactured Starter Adapter on the O'Neals' aircraft.

¶ 54 "A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction." *ALS Scan, Inc.*, 293 F.3d at 714. CMI supports the "online technical library" with updates to notify its subscribers. The website contains a commercial nature due to its paid subscriptions. When considered with CMI's other contacts "related to" North Carolina and its "purposeful availment" of our forum, these contacts are sufficient to support our holding of specific personal jurisdiction. *Havey*, 172 N.C. App. at 815, 616 S.E.2d 646-47; N.C. Gen. § 1-75.4 (2019).

III. Conclusion

¶ 55 CMI properly raised the defense of lack of personal jurisdiction in its Answer to Plaintiff's Complaint. A North Carolina court exercising jurisdiction, pursuant to our long-arm statute, does not violate the Due Process Clause of the Fourteenth Amendment. This interlocutory appeal is properly before this Court.

¶ 56 Consistent with *Ford*, CMI is being haled into North Carolina's court, not for its nationwide contacts, nor fifty states' presence, nor merely placing an item into the stream of commerce, but for its specific contacts with North Carolina companies and consumers. I concur in part and concur in the result in part.

CRAIG v. NEAL

[279 N.C. App. 148, 2021-NCCOA-450]

ERIC E. CRAIG AND WIFE, GINA D. CRAIG, PLAINTIFFS

v.

BETTY BLAIR NEAL, DEFENDANT

AND

JACK HUDSON AND WIFE, GINNER HUDSON, AND JAMES F. SHUMAN, JR. AND WIFE,
ANNE MARIE P. SHUMAN, NOMINAL DEFENDANTS

No. COA20-261

Filed 7 September 2021

**Easements—appurtenant—right-of-way to road—fence dispute
between neighbors**

In a dispute that arose when plaintiffs built a fence that blocked defendant, their neighbor, from using a right-of-way that straddled their respective properties, the trial court erred by concluding that the right-of-way was a public right-of-way owned by the city, where the undisputed facts did not support such a conclusion. The previous owners of the large tract that was sold and divided into multiple lots (some of which were purchased by plaintiffs and defendant) created the right-of-way as a private appurtenant easement for the benefit of the owners of the adjacent land (benefiting plaintiffs and defendant here), as evidenced by a recorded 1952 plat (filed in anticipation of the large tract's sale and showing the new right-of-way) and other documents filed contemporaneously.

Appeal by Plaintiffs from order entered 28 October 2019 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2021.

Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies, for the Plaintiffs-Appellants.

Johnston, Allison & Hord, P.A., by Mary Fletcher Mullikin and Martin L. White, for the Defendant-Appellee

DILLON, Judge.

I. Background

¶ 1 Plaintiffs own a 2.57-acre lot located within Country Colony, a 17-lot residential subdivision in Charlotte. Defendant owns three residential lots adjacent to Plaintiffs' lot, but which lie *outside* of the Country

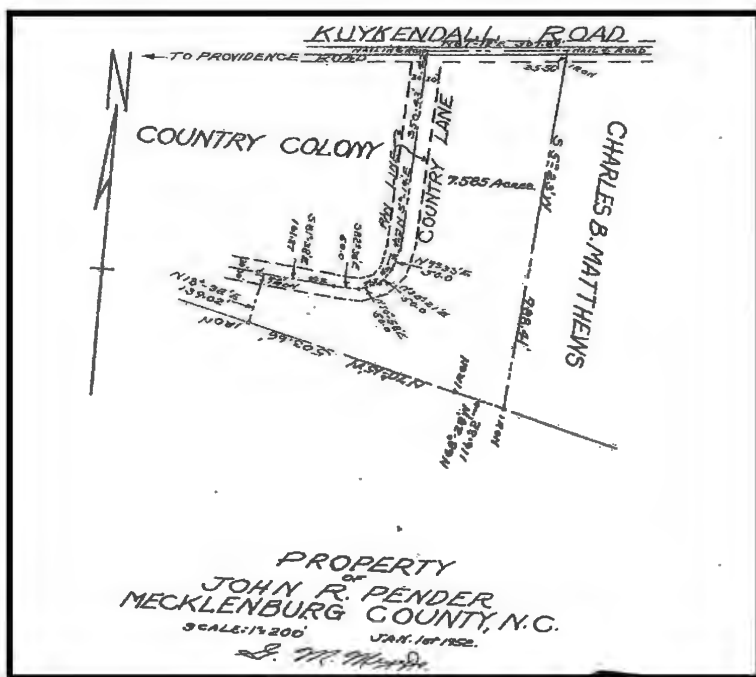
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Colony subdivision. Their dispute concerns their respective rights, if any, to use a certain right-of-way depicted on a plat recorded in 1952 when Plaintiffs' lot and Defendant's three lots were part of a larger tract.

¶ 2

Prior to 1952, Plaintiffs' lot and Defendant's three lots were part of a larger 65-acre tract of land owned by the Newsons, a married couple. In 1952, a plat (the "1952 Plat") was recorded depicting a 7.585-acre tract carved out from the 65-acre tract. The 1952 Plat is reproduced below:



This 1952 Plat was filed in anticipation of the Newsons conveying part of their 65-acre tract – specifically this 7.585-acre tract – to another couple, the Penders, and retaining the remaining 57 acres for the development of Country Colony. The 1952 Plat depicts a new right-of-way, labeled as "Country Lane," straddling the boundary separating the 7.585-acre tract shares from the future Country Colony subdivision. Based upon the 1952 Plat, Country Lane is depicted as a right-of-way sixty (60) feet in width, with thirty (30) feet in width on either side of the boundary line.

¶ 3

Over the course of time, this 7.585-acre tract was subdivided into lots, with Defendant acquiring three of said lots. Country Colony was

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developed into 17 lots, with Plaintiffs coming to own the lot adjacent to Defendant's property, along the bend of County Lane.

¶ 4 Also, at some point, two gravel roads were created within the Country Lane right-of-way. One of these roads provides Defendant access to her lots from Kuykendall Road. In 2018, Plaintiffs erected a fence on their lot that extended across the gravel road, depriving Defendant's ability to use the road to access Kuykendall Road from her lots. Plaintiffs' act led to the commencement of this action.

¶ 5 The matter was tried without a jury. Plaintiffs argued at trial, in part, that any right that Defendant might have had in Country Lane was extinguished by operation of the Marketable Title Act. The trial court, however, determined that Country Lane is, in fact, a public right-of-way, owned by the City of Charlotte. The trial court concluded the Marketable Title Act does not apply and ordered Plaintiffs to remove the fencing. Plaintiffs timely appealed.

II. Standard of Review

¶ 6 Since this matter was tried by the trial judge, and not by a jury, "the trial court is the fact finder; and on appeal, [we] are bound by the trial court's findings if competent evidence in the record supports those findings." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000). However, we review *de novo* the trial court's conclusions of law and whether those conclusions are supported by the findings of fact. *See Kirby Bldg. Sys., Inc. v. McNeil*, 327 N.C. 234, 241, 393 S.E.2d 827, 831 (1990).

III. Summary of Opinion

¶ 7 The parties dispute their respective rights to use the Country Lane right-of-way. Accordingly, "Country Lane," as used in this opinion, refers specifically to the 60-foot wide, right-of-way area *as depicted on the 1952 Plat*, and not to the gravel roads themselves or to any other area.¹

¶ 8 The trial court determined that Country Lane is a public right-of-way, owned by the City of Charlotte, based on its finding that the Newsons dedicated Country Lane to the city when they recorded the 1952 Plat. Based on this determination, the trial court declared that all parties (and the public) have the right to use all of the Country Lane right-of-way.

1. There was also evidence that a paved road extends along the southern border of the Country Colony subdivision *west of* Lot 10. This paved road was formally offered to and accepted by the City of Charlotte by the impacted lot owners. This paved road is also called Country Lane and does connect with the Country Lane right-of-way as depicted on

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¶ 9 We conclude, however, that the trial court's findings and the undisputed facts do not support the trial court's finding that the Newsoms intended to dedicate Country Lane to the City of Charlotte or any other governmental body back in 1952. Rather, we conclude the Newsoms intended to create private easement rights for the benefit of the owners of the land adjacent to Country Lane as a matter of law. It may be that the City of Charlotte has come to own all or portions of Country Lane based on *some other legal theory*. However, no other theory has been argued in this appeal; the findings and the evidence in the record do not conclusively establish the City's ownership as a matter of law; and the City is not a party to this action.

¶ 10 Further, we conclude the parties have private appurtenant easement rights to portions of Country Lane not on their respective lot(s) for ingress and egress to the public roads.²

IV. Analysis

A. No Substantial Evidence That Country Lane Is a Public Right-Of-Way

¶ 11 The trial court found that the Newsoms (who owned the original 65-acre tract) dedicated Country Lane as a *public road* in 1952. Specifically, the trial court found:

The process followed by the developer of Country Colony [the Newsoms] was typical for plats filed in the 1950s when rights of way were offered for *dedication* to the public. In the case, the recordation of the [1952 Plat] was an offer to dedicate Country Lane to the public.

(Emphasis added.) This theory of “dedication” formed the sole theory by which the trial court determined Country Lane to be a public road owned by the City of Charlotte.

¶ 12 The term “dedication” refers to the process by which an owner/developer of real estate offers, either formally or informally, some portion of his development *to the general public*, typically for a road, and said

the 1952 Plat. However, this matter only concerns the non-paved portion of Country Lane, which is the right-of-way depicted in the 1952 Plat.

2. Nominal defendants (the Hudsons and the Shumans) own other lots that Country Lane crosses. The Hudsons own Lot 11 within Country Colony to the north of Plaintiffs' lot on the west side of Country Lane. The Shumans own a lot outside of Country Colony to the north of Defendant's lots on the east side of Country Lane.

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offer is accepted by the governing authority. *See Spaugh v. Charlotte*, 239 N.C. 149, 159-60, 79 S.E.2d 748, 756 (1954).³

¶ 13 A dedication *offer* can be made either expressly or through implication. *Id.* at 159, 79 S.E.2d at 756 (stating that “[d]edication may be either in express terms or may be implied from conduct on the part of the owner”). But a dedication is only completed when the developer’s offer is *accepted* by the responsible public authority. *Wofford v. Highway Commission*, 263 N.C. 677, 683, 140 S.E.2d 376, 381 (1965).

¶ 14 We conclude that no substantial evidence exists in the record to support the trial court’s finding that the Newsons intended to offer, expressly or by implication, Country Lane *to the public*. Rather, the 1952 Plat and other documents filed contemporaneously demonstrate that the Newsons intended to create Country Lane as a *private* appurtenant easement for the benefit of the subdivided 7.585-acre tract and the to-be-developed Country Colony tract.

¶ 15 Specifically, no evidence tends to show the Newsons expressly offered to dedicate Country Lane for public use. The 1952 Plat merely identifies Country Lane as a “R/W,” meaning right-of-way, without any express indication that the right-of-way was dedicated for public use. The trial court did determine, though, that the Newsons *impliedly* offered for dedication Country Lane when they recorded the 1952 Plat.

¶ 16 Our Supreme Court has recognized that where an owner of land files a plat showing land subdivided “into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets . . . [to] the public.” *Blowing Rock v. Gregorie*, 243 N.C. 364, 367, 90 S.E.2d 898, 901 (1956). However, our Supreme Court has also recognized that an owner filing a plat may be deemed to have granted a private easement solely to the adjacent landowners and *not* a grant to the public:

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets,

3. If an easement is created for the benefit of the property owners within the development only, such grant is not technically a “dedication.” That is, the term “dedication” technically refers to a grant of rights to the public at large. It is not the appropriate term when referring to the creation of *private* easement rights.

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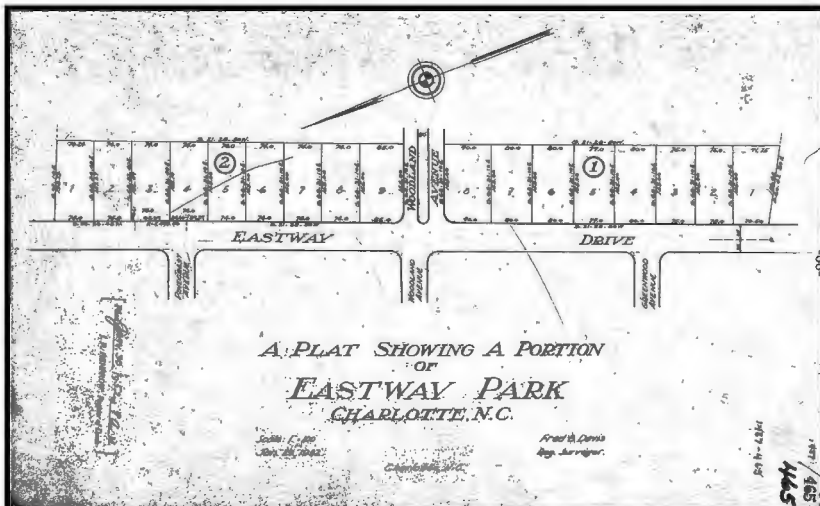
[279 N.C. App. 148, 2021-NCCOA-450]

parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant.

Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citations omitted).

¶ 17

In reaching its determination that the Newsons intended an offer to the public when they recorded the 1952 Plat, the trial court relied on “expert” testimony. The opinion was essentially that the manner in which the 1952 Plat and another plat filed the same year laying out the 17 lots of Country Colony was the manner in which real estate developers during that time would go about dedicating a street to the public. We conclude, however, while expert opinion is admissible on the proper legal interpretation of recorded real estate documents, the “expert” opinion offered at the trial below was clearly not reliable. Specifically, the plats upon which the expert opinion was based are materially different from the 1952 Plat. The plats relied upon depicted subdivisions where the property lines for the lots did not extend to the center line of the streets. Rather, the streets depicted were not part of any lot to be sold. And no lots were sold in those subdivisions which included ownership of any part of the streets depicted on the plats. Below is one of the plats relied upon by the expert; specifically, a plat from 1952 depicting the Eastway Park subdivision in Charlotte, recorded in Map Book 1487, Page 465 in the Mecklenburg County Registry:



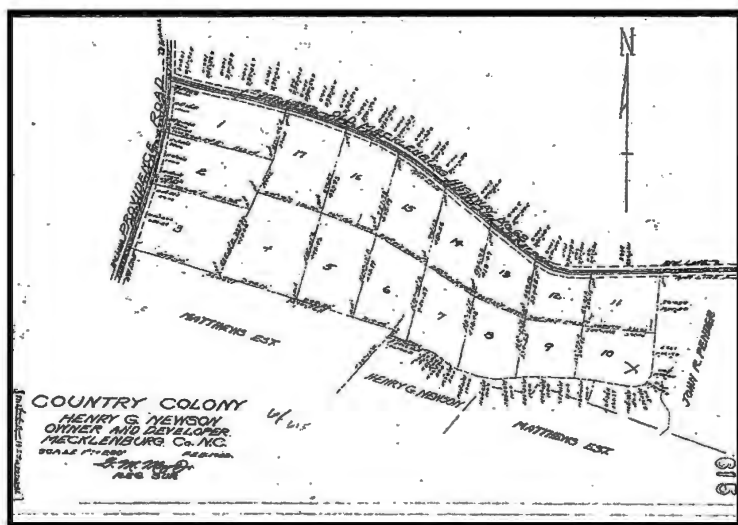
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It could certainly be “implied” from the above plat that the developer of Eastway Park intended the streets depicted to be open to the public, in large part because these streets are not part of anyone’s private lot. The other plats the expert relied upon also depict streets that are not part of any lot that was sold.⁴

¶ 18 The 1952 Plat that created Country Lane, though, depicts the boundary line subdividing the 7.585-acre tract from the 57 acres which would become Country Colony running down the middle of the Country Lane right-of-way. Again, this 1952 Plat was recorded in January 1952. A month later, in February 1952, when the Newsons actually conveyed the 7.585-acre tract to the Penders, the deed description included half of the Country Lane right-of-way, describing a boundary as running along “the center of Country Lane.”

¶ 19 Also in February 1952, the Newsons filed another plat depicting the to-be-developed Country Colony subdivision. This map of Country Colony provides further proof that the Newsons did not intend to dedicate Country Lane to the public. This map shows Country Colony’s 17 lots (including Lot 10 now owned by Plaintiffs). It depicts the 7.585-acre tract adjacent to Country Colony as land owned by “John R. Pender.” But this plat does not show the Country Lane right-of-way. The Country Colony subdivision plat is shown below.



4. These other plats include (1) a plat recorded in 1952 in Map Book 1487, Page 457, showing Shamrock Gardens subdivision; (2) a plat recorded in 1952 in Map Book 1487,

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¶ 20 We further note that the Newsons could not have intended to dedicate Country Lane to the City of Charlotte, as this area of Mecklenburg County was not annexed into the City of Charlotte until the 1980s, decades after the 1952 Plat was recorded. All of the trial court's findings regarding the City's involvement with Country Lane concern events that occurred after 1980.

B. The 1952 Plat Did Create Private Easement Rights

¶ 21 We conclude that the recording of the 1952 Plat in January 1952, and the conveyance of the 7.585-acre tract to the Penders referencing the 1952 Plat the following month, created private easement rights in Country Lane. *See Hobbs*, 261 N.C. at 421, 135 S.E.2d at 36.

¶ 22 It is true that when the Newsons later sold lots in Country Colony, none of the deeds conveying these lots ever referred to the 1952 Plat. Rather, those deeds referred to the *Country Colony map*, which does not depict Country Lane. However, before the Newsons ever conveyed any lot in Country Colony, they conveyed the 7.585-acre tract to the Penders by deed which did reference the 1952 Plat.

¶ 23 Based on *Hobbs* and other Supreme Court jurisprudence, we hold that the conveyance of the 7.585-acre tract by the Newsons to the Penders included, by implication, private easement rights in Country Lane for the benefit of the 7.585-acre tract and reserved private easement rights in Country Lane for the tract which would later become Country Colony for the lots fronting on Country Lane. Accordingly, when the Newsons later conveyed lots in Country Colony (including Lot 10 now owned by Plaintiffs), the grantees of those lots along Country Lane took *subject to* the appurtenant easement rights of the owner(s) of the 7.585-acre tract. Likewise, these grantees received appurtenant easement rights to the portion of Country Lane on the other side of the boundary line of the 7.585-Acre tract.

C. Current Rights in Country Lane

¶ 24 Having concluded that the predecessors-in-title to Plaintiffs' lot and Defendant's three lots had appurtenant easement rights in Country Lane, we next consider whether those rights still exist.

¶ 25 Private easement rights may be extinguished in a number of ways. For instance, such rights may be extinguished by abandonment, *see Miller v. Teer*, 220 N.C. 605, 612, 18 S.E.2d 173, 178 (1942), by the servient

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owner's adverse use for twenty years, *see Duke Energy Carolinas, LLC v. Gray*, 369 N.C. 1, 7, 789 S.E.2d 445, 449 (2016), or by the Marketable Title Act, *see* N.C. Gen. Stat. § 47B-2 (2018) (stating if a property owner has an unbroken chain of title dating back thirty years, earlier rights and interests in the land are extinguished, barring a few exceptions).

¶ 26 Here, the trial court, as factfinder, found that “[t]here was no evidence that any portion of Country Lane has been abandoned by [any of the parties].” No party challenges this finding as erroneous. Therefore, it is binding on appeal.

¶ 27 Plaintiffs, though, argue that Defendant lost any right to use the portion of Country Lane located on their Lot 10 based upon operation of the Marketable Title Act. We disagree.

¶ 28 This Act provides that an owner of land takes free of nonpossessory interests that others may have but which do not appear in the owner's chain of title going back thirty (30) years. N.C. Gen. Stat. § 47B-2. Here, the trial court found that Defendant (and her family) have been continuously using the gravel road since 1966 which Plaintiffs blocked in 2018. Based on this finding, we conclude that Defendant's private easement rights in the portion of Country Lane on Plaintiffs' Lot 10 have not been extinguished by operation of the Marketable Title Act. We so conclude based on an exception under N.C. Gen. Stat. § 47B-3(3), which provides that the Act shall not affect or extinguish “interests [or] claims . . . of any person who is in present, actual and open possession of the real property so long as such person is in such possession.”

¶ 29 Plaintiffs argue that they own one of the gravel roads based on the theory of adverse possession. We presume that Plaintiffs are contending that they now have fee simple rights to all portions of this road, including the portions on Defendant's lot. We reject this argument as there is no evidence that this use was hostile, as in, exclusive. *See State v. Brooks*, 275 N.C. 175, 180, 166 S.E.2d 70, 73 (1969) (recognizing that an element of adverse possession is that the possession must be “hostile”). Rather, Plaintiffs' use of this road was not hostile, as they have always had private easement rights to this road, as it lies within Country Lane, and the evidence showed that Defendant used the road.

¶ 30 We do not address whether the parties, or some of them, may have lost easement rights in the undeveloped portions of Country Lane (areas where there is no gravel road established) where it could be shown that the fee simple owner of said portions denied access to the easement owner(s). The trial court made no findings in this regard, and no party

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[279 N.C. App. 157, 2021-NCCOA-451]

has made any argument on appeal that rights in undeveloped portions of Country Lane have been lost through adverse possession.

V. Conclusion

¶ 31 The trial court correctly concluded that the parties have the right to use Country Lane but that the court erred in its reasoning. Specifically, the trial court erred in concluding that Country Lane is a public road based upon the 1952 Plat. Notwithstanding, we conclude that the parties have private, appurtenant easement rights in Country Lane. No party may interfere with the easement rights in Country Lane of the other parties.

¶ 32 Accordingly, we reverse the trial court's order declaring Country Lane to be a public street or road. We, otherwise, affirm the trial court's order declaring the parties' rights in Country Lane, but for the reason that each adjoining property owner was granted and possesses private, appurtenant easement rights to the other parties' lots within the Country Lane right-of-way.

**AFFIRMED AS MODIFIED IN PART, REVERSED IN PART,
AND REMANDED**

Judges TYSON and ARROWOOD concur.

FMSH L.L.C., PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION
OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND CERTIFICATE
OF NEED SECTION, RESPONDENT

AND

SENTARA ALBEMARLE REGIONAL MEDICAL CENTER, LLC, AND SENTARA
HEALTHCARE, RESPONDENT-INTERVENORS

No. COA20-102

Filed 7 September 2021

**Hospitals and Other Medical Facilities—certificate of need—
exemption from review process—legacy medical care facility
—acquisition or reopening**

In a certificate of need (CON) case in which an applicant gave notice of its intent to reopen an ambulatory surgery center that was issued two CONs under its prior owner but then closed—a facility

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[279 N.C. App. 157, 2021-NCCOA-451]

that the applicant argued was exempt from CON review as a legacy medical care facility—the determination by the Department of Health and Human Services that N.C.G.S. § 131E-184(h) required the applicant to first acquire legal ownership of the facility before obtaining a CON constituted a reasonable statutory interpretation within the agency's authority (in particular, of the phrase “acquire or reopen”). Where the administrative law judge (ALJ) failed to defer to the agency's decision when it ordered the agency to transfer the previously-issued CONs to the applicant, its decision was reversed and the matter remanded for entry of summary judgment in favor of the agency and the facility's current owner.

Appeal by Respondents from Final Decision entered 9 October 2019 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 12 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney Generals Bethany A. Burgon and Kimberly Randolph, and Fox Rothschild LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for the Respondent- and Respondent-Intervenor-Appellants.

FMSH, L.L.C., by Managing Member Catherine Fleming, pro se.

Wyrick Robbins Yates & Ponton LLP, by Frank Kirschbaum and Charles George, for amicus curiae The County of Franklin, North Carolina.

Nelson Mullins Riley & Scarborough LLP, by Denise M. Gunter and Chelsea K. Barnes, for amicus curiae FirstHealth of the Carolinas, Inc.

Poyner Spruill, LLP, by Matthew Fisher, for amici curiae NCHA, Inc., and North Carolina Baptist Hospital.

K&L Gates, LLP, by Gary Qualls and Susan Hackney, for amici curiae University Health Systems of Eastern Carolina, Inc. d/b/a Vidant Health and The Outer Banks Hospital, Inc.

Fox Rothschild, LLP, by Terrill Johnson Harris, for amici curiae The Moses H. Cone Memorial Hospital Operating Corporation and The Moses H. Cone Memorial Hospital.

GRIFFIN, Judge.

FMSH L.L.C. v. N.C. DEP'T OF HEALTH & HUM. SERVS.

[279 N.C. App. 157, 2021-NCCOA-451]

¶ 1 Respondent Healthcare Planning and Certificate of Need Section of the North Carolina Department of Health and Human Services (the “Agency”) and Respondent-Intervenors Sentara Albemarle Regional Medical Center, LLC, and Sentara Healthcare (together, “Sentara”) appeal from the final decision of an administrative law judge in the Office of Administrative Hearings directing the Agency to transfer two Certificates of Need authorizing operation of a Legacy Medical Care Facility from Sentara to Petitioner FMSH, L.L.C. (“FMSH”). The final decision held that FMSH could not be required to acquire the physical facilities previously operated under the Certificates of Need as a condition precedent to its receipt of the Certificates of Need. We reverse the final decision and remand for entry of an order granting summary judgment to the Agency and Sentara.

I. Factual and Procedural History

¶ 2 The Sentara Kitty Hawk Ambulatory Surgery Center (“the Facility”) was a multi-specialty ambulatory surgery facility operated from 1989 to 2017 in Kitty Hawk. In 1989, the Agency issued a Certificate of Need (“CON”) to Regional Medical Services, Inc. (“RMS”), for the establishment of an ambulatory surgery facility at 5200 North Croatan Highway in Kitty Hawk. In 2002, the Agency issued to RMS a second CON authorizing RMS to open a diagnostic center at the Facility. Together, the two CONs allowed RMS to maintain two operating rooms and diagnostic equipment within the Facility.

¶ 3 In late 2013 or early 2014, Sentara acquired all of RMS’s assets regarding the Facility, including the CONs, and continued operating the Facility. In late 2017, Sentara closed the Facility. At the time of the administrative hearing in this case, Sentara had no plans to reopen or resume operation of either the ambulatory facility or diagnostic center portion of the Facility.

¶ 4 On 25 June 2018, FMSH notified the Agency that it intended to reopen the Facility. FMSH proposed that its intended reopening of the Facility was exempt from the CON review process because the Facility qualified as a “Legacy Medical Care Facility [“LMCF”]” under N.C. Gen. Stat. 131E-184(h). At the time of its request, FMSH had no legal interest in the Facility, and had not contacted Sentara about purchasing or reopening the Facility.

¶ 5 On 31 January 2019, the Agency advised FMSH by response letter that it agreed FMSH’s “proposal [was] exempt from [CON] review under N.C. Gen. Stat. § 131E-184(h).” The Agency further stated that it knew FMSH had not entered into any negotiations to purchase the Facility

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from Sentara, and that it would not “knowingly issue [an] exempt from review determination[] for [a] hypothetical proposal[] to acquire an existing health service facility.” The Agency informed FMSH that its request to reopen the Facility would be exempt from the CON review process under two conditions: First, FMSH was required to legally acquire the Facility from Sentara. Second, FMSH would be required to reopen the Facility by 24 June 2021, within thirty-six months of FMSH’s written notice of intent to reopen.

¶ 6 FMSH filed a petition for a contested case hearing which challenged the Agency’s two conditions for exemption approval. FMSH and the Agency each moved for summary judgment. On 9 October 2019, an administrative law judge (“ALJ”) entered a Final Decision from the Office of Administrative Hearings, determining that the Agency did not have the authority to impose its first condition requiring FMSH to acquire a legal interest in the Facility. The Final Decision granted summary judgment to FMSH and directed the Agency to transfer the CONs from Sentara to FMSH. The Agency and Sentara timely appeal.

II. Analysis

¶ 7 The Agency and Sentara argue that, by granting summary judgment in FMSH’s favor, the ALJ reached an “impermissible” decision which “fail[ed] to defer to the Agency’s interpretation, which [was] reasonable and consistent with the language of the statute.” We agree.

¶ 8 We review an ALJ’s final decision granting summary judgment *de novo*, considering all evidence presented in the light most favorable to the non-moving party. *Blue Ridge Healthcare Hosps. Inc., v. N.C. Dep’t of Health & Hum. Servs., Div. of Health Serv. Regul., Healthcare Plan. & Certificate of Need Section*, 255 N.C. App. 451, 455–56, 808 S.E.2d 271, 274 (2017) (citations omitted). Summary judgment is properly granted if the record shows “that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Ron Medlin Const. v. Harris*, 364 N.C. 577, 580, 704 S.E.2d 486, 488 (2010) (citation and quotation marks omitted); N.C. R. Civ. P. 56(c). A Court reviewing the final decision of an ALJ may “affirm the decision[,]” “remand the case for additional proceedings[,]” or “reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . (4) [a]ffected by . . . error of law[.]” N.C. Gen. Stat. § 150B-51(b) (2019).

¶ 9 Our analysis begins by acknowledging that no issues of material fact were present in the Record before the ALJ. The parties agreed on the material facts of the case in their pleadings in the contested hearing

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below, and each motioned for the ALJ to determine the case in their favor as a matter of law. The only issue before this Court is whether the ALJ properly construed the relevant statutory authority.

¶ 10 The Agency initially determined that it would not issue an exemption to “reopen” the Facility without CON review because FMSH did not own it and required FMSH to first “acquire” the Facility by acquiring legal ownership of the Facility from Sentara. The ALJ held that the Agency had misinterpreted the statutory meaning of “acquire or reopen” as the terms are used in N.C. Gen. Stat. § 131E-184(h). The question, then, is whether section 131E-184(h) requires a party who intends to “acquire or reopen” a LMCF to first have legal ownership of that facility.

¶ 11 Chapter 131E of the North Carolina General Statutes details the purpose of North Carolina’s CON law and the review process by which the Agency may determine the need for and distribute CONs. Upon its determination that a geographical area is in need of health services, the Agency first establishes a schedule of time in which it will receive applications from entities that offer to provide the needed services. N.C. Gen. Stat. §§ 131E-177, 131E-182 (2019). Applicant-entities then submit applications to the Agency describing the entity’s plan to fulfill certain criteria, including: how the area’s health service need will be fulfilled; which population will be served and why that population needs service; how increased health service competition will affect the service area; and what is the availability of human and financial resources to accommodate the plan. N.C. Gen. Stat. § 131E-183 (2019).

¶ 12 The Agency reviews submitted applications for a period of up to ninety days. During this time it may solicit or receive written comments and/or conduct public hearings to discuss the applications. N.C. Gen. Stat. § 131E-185 (2019). This review period may be extended by up to sixty days if additional information is requested from the applicants. N.C. Gen. Stat. § 131E-185(c). The Agency then issues a written decision to “approve,” “approve with conditions,” or “deny” each application, outlining its findings, conclusions, and criteria used. N.C. Gen. Stat. § 131E-186 (2019). The Agency ordinarily issues a CON to an applicant-entity within thirty-five days of its decision to approve, or approve with conditions, the application. N.C. Gen. Stat. § 131E-187(c)(1) (2019). However, the issuance of a CON may be delayed indefinitely by an applicant’s filing of a contested case hearing challenging the Agency’s decision. N.C. Gen. Stat. § 131E-187 (2019).

¶ 13 The routine CON review process is statutorily sanctioned to take between 125 and 190 days. At the end of this process, an entity which

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receives or “subsequently acquire[s], in any matter whatsoever permitted by law[,]” a CON is thereafter “required to materially comply with the representations made in its application for that [CON].” N.C. Gen. Stat. § 131E-181(b) (2019).

¶ 14 A CON may be transferred or reassigned by an active health service provider, but only if the transfer or reassignment complies with the terms of N.C. Gen. Stat. § 131E-189(c). N.C. Gen. Stat. § 131E-181(a). The transfer or reassignment of a CON by an active health service provider does not require the recipient to undergo the full CON review process. N.C. Gen. Stat. § 131E-184(a)(8) (2019) (“[T]he [Agency] shall exempt from [CON] review a new institutional health service if it receives prior written notice from the entity proposing . . . [t]o acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.”).¹ Rather, the recipient-entity “will be subject to the requirement that the service be provided consistent with the representations made in the application and any applicable conditions the [Agency] placed on the [CON].” N.C. Gen. Stat. § 131E-189(c) (2019); *see* N.C. Gen. Stat. § 131E-190(i) (2019) (subjecting CON holder to civil suit for “operating a service which materially differs from the representations made in its application for that [CON]”).

¶ 15 An entity may also obtain a CON to operate a health facility without undergoing the usual CON review process if it meets one of the other exemptive criteria in N.C. Gen. Stat. § 131E-184. Under section 131E-184(h), relevant to this appeal, the Agency “must exempt from [CON] review the acquisition or reopening of a [LMCF].” N.C. Gen. Stat. § 131E-184(h) (2019). A “LMCF” is defined in chapter 131E as a facility that (1) “[i]s not presently operating[,]” (2) [h]as not continuously operated for at least the last six months[,] and (3) was operated within the last twenty-four months by a licensed operator for the primary purpose of offering diagnostic, therapeutic, or rehabilitative services. N.C. Gen. Stat. § 131E-176(14f) (2019). Section 131E-184(h) also requires the entity to provide the Agency with written notice of how, where, and when it intends to operate the LMCF:

The person seeking to operate a [LMCF] shall give the [Agency] written notice of all of the following:

(1) Its intention to acquire or reopen a [LMCF] within the same county and the same service area as the

1. *Cf.* Fla. Stat. §§ 408.036, 408.042 (2019) (requiring the transfer of a CON to undergo an expedited review process verifying the recipient’s financial resources).

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facility that ceased continuous operations. If the [LMCF] will become operational in a new location within the same county and the same service area as the facility that ceased continuous operations, then the person responsible for giving the written notice required by this section shall notify the [Agency], as soon as reasonably practicable and prior to becoming operational, of the new location of the [LMCF]. For purposes of this subdivision, “service area” means the service area identified in the North Carolina State Medical Facilities Plan in effect at the time the written notice required by this section is given to the Department.

(2) That the facility will be operational within 36 months of the notice.

N.C. Gen. Stat. § 131E-184(h).

¶ 16

The “cardinal principle” of statutory construction is “to give effect to the legislative intent.” *State v. Tew*, 326 N.C. 732, 738–39, 392 S.E.2d 603, 607 (1990). This Court strives to give “the language of the statute its natural and ordinary meaning unless the context requires otherwise.” *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citation and quotation marks omitted). “Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.” *Id.* (citation and quotation marks omitted). When engaging in judicial construction, this Court ascertains legislative intent by considering “the purpose of the statute and the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory construction.” *Tew*, 326 N.C. at 738–39, 392 S.E.2d at 607.²

All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation. *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E.2d 289 (1968). A construction of a statute which operates to defeat or impair its purpose must

2. “These rules apply to both criminal and civil statutes.” *Tew*, 326 N.C. at 739, 392 S.E.2d at 607.

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be avoided if that can reasonably be done without violence to the legislative language. *State v. Hart*, 287 N.C. 76, 213 S.E.2d 291 (1975). Individual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978).

Id.

¶ 17 We agree with the ALJ's assessment that there is little ambiguity in section 131E-184(h) on its face. "Acquire" and "reopen" are each terms with ordinary usages, and each appear to be used in their ordinary way. Neither "acquire" nor "reopen" is defined within section 131E-184. Section 131E-176, the definitions statute for chapter 131E, also does not define the terms "acquire" and "reopen." See N.C. Gen. Stat. § 131E-176 (2019). "Acquire" is ordinarily defined as "to get as one's own." *Acquire*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/acquire> (last visited Aug. 18, 2021). "Reopen" naturally means "to open again." *Reopen*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/reopen> (last visited Aug. 18, 2021). Any ambiguity in these terms arises from the particular legal effect of the words when used together in the statute, and in the phrase "acquire *or* reopen." Notably, this phrase signals an implicit contrast between the two terms.

¶ 18 The ALJ's decision focuses, in large part, on the implicit contrast that the word "or" creates between "acquire" and "reopen." Under the ALJ's view, making the acquisition of a facility a condition precedent to an entity's ability to reopen that facility (as the Agency interpreted the statute) would change the plain meaning of the statutory language from "acquire *or* reopen" to "acquire *and* reopen." The Final Decision states, *inter alia*:

Clearly, the language [of N.C. Gen. Stat. § 131E-184(h)] is a directive to the Agency that it "must exempt from [CON] review" without qualification. The question then becomes what is exempt. The answer is the "acquisition or reopening" of a [LMCF]. The statute specifically applies to the acquisition or reopening of a "facility." It specifically does not speak to the acquisition of anything else in particular, including the actual [CON].

....

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According to [the Agency and Sentara], regarding a [LMCF], a person cannot “reopen” a facility that they do not own. They contend that the exemption “affords providers a finite time period in which to either exercise their right to reopen a [LMCF], or to transfer the facility to someone else who will operate it as permitted by the CON law.”

This interpretation changes the plain meaning of the statute from “acquire *or* reopen” to “acquire *and* reopen.”

To rule with [the Agency and Sentara], one must conclude that the [LMCF] exemption was enacted to protect the financial interests of the entity that has failed and given up the provision of health care services to that service area. To put control of health care services in the hands of a failed business and for that entity to be able to hold up the provision of those services for two years, rather than the healthcare needs of North Carolinians in rural communities, is an absurdity.

¶ 19 We disagree with this interpretation. The statute specifically does “speak to the acquisition of . . . the actual [CON].” The language of section 131E-184(h) illustrates an instance where an entity may acquire a CON without undergoing the usual CON review process: when that entity intends to acquire or reopen a LMCF. Under this specific statute, the acquisition of a CON is tied to the entity’s possession of a previously established and constructed health services facility. Under the initial CON review process, an applicant-entity whose application is approved is given a reasonable time to construct its facility following that approval and may not begin constructing a facility before CON approval. *See* N.C. Gen. Stat. §§ 131E-189, 131E-190(b).

¶ 20 The act of using an awarded CON and engaging in the provision of medical services is acknowledged by section 131E-184(h) in the word “operate.” N.C. Gen. Stat. § 131E-184(h) (“The person seeking to *operate* a [LMCF] shall give the [Agency] written notice of . . . [i]ts intention to acquire or reopen a [LMCF][.]” (emphasis added)). In its flawed interpretation, the ALJ assigns the pragmatic role of “operating” the facility to the word “reopen.” The Agency’s interpretation does not alter the plain meaning of the statute from “acquire *or* reopen” to “acquire *and* reopen.” Rather, this interpretation reveals the statute’s contemplation

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of two distinct avenues to operating a LMCF: “acquire and operate” *or* “reopen and operate.” Which avenue is available to an entity stems from the entity’s legal right to the facility at the time the Agency initially issued the CON. If we accept the ALJ’s interpretation, it would require us to read “acquire” to mean “obtain and not use” and read “reopen” to mean “open again and operate;” there would then be no need for the legislature to have included the word “operate” earlier in the statute. *See N.C. Dep’t of Correction v. N. C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (“Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used.”). The ALJ’s view contemplates a world where an entity may evoke section 131E-184 to simply acquire the facility without an intent to actually operate it. Such a world is a legal nullity because the entity’s intent to operate the LMCF is a previously addressed, material component of section 131E-184(h).³

¶ 21 When reading the sections of chapter 131E outlining the general CON review process *in pari materiae*, it becomes clear that the intent of section 131E-184 as a whole is to alleviate the need to undergo a minimally 125-day, investigatory review period before an entity may operate a healthcare facility in specifically enumerated circumstances. The LMCF exemption in section 131E-184(h) acknowledges that, where an entity and its licensed facility have previously passed scrutiny and intend to once again offer those services in the same manner and form, there is less risk that the new services will not pass scrutiny when services are resumed. Written notice under section 131E-184(h) does not trigger the same regiment of comments, hearings, and extensive review that is necessitated under section 131E-185.

¶ 22 If the entity who wishes to operate the facility is the same entity who owns or has acquired the facility, that entity would be bound to adhere to “the representations made in the application and any applicable conditions the [Agency] placed on the [CON].” N.C. Gen. Stat. § 131E-189(c). Likewise, there would be a single, easily identifiable

3. The ALJ’s Final Decision alludes to three other instances where N.C. Gen. Stat. § 131E-184(h) has been used by an applicant-entity but does not provide citations to these instances. The ALJ contends that, in two of these cases, the entity invoking section 131E-184(h) actually acquired, in the ordinary meaning of the term, the subject LMCF and then never operated it. We note that the fact that an entity may have acquired and never operated an LMCF under the statute does not eliminate the materiality of that entity’s expressed intent to operate the LMCF in order to first qualify for exemption from CON review—it means only that the entity did not follow through with the intent expressed in its notice to the Agency.

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entity with a legal claim to the facility. The ALJ's interpretation leaves open a significant question to be answered in a subsequent case: If an entity does not need to first own a LMCF before it is given a CON to operate that LMCF, and multiple entities all notify the Agency of their intent to operate that LMCF, which entity is awarded the CON? Developing an answer to this hypothetical question in the present case would be advisory, but consideration of the hypothetical reveals a pivotal concern in the ALJ's interpretation. If multiple entities all expressed an intent to operate the LMCF, the Agency would need to undergo some additional review process to determine which entity is awarded the CON for the LMCF. The need for additional, perhaps attenuated review defeats the legislative intent of section 131E-184—to avoid a bidding war when the circumstances have a unique set of situational characteristics.

¶ 23 The ALJ refers to the Agency's decision as effecting an "absurdity," asserting that an adoption of the Agency's interpretation would necessitate holding that the legislative intent of section 131E-184(h) was to protect the financial interests of a failed business entity. We disagree. Rather, it would be an "absurdity" to force a new entity to give a failed business an economic windfall by buying their assets, but it would be equally absurd to allow a new entity to step into the shoes of another entity, take on the economic benefits of operating a health service facility, and obtain a CON without paying for the privilege to avoid the associated burdens first.

¶ 24 Finally, we note that the language of section 131E-184(h) allows an entity to physically relocate the LMCF that it intends to "acquire or reopen." We do not find section 131E-184(h)'s acknowledgement that the LMCF may "become operational in a new location within the same county and the same service area as the facility that ceased continuous operations" to conflict with our holding in this case. *See* N.C. Gen. Stat. § 131E-184(h). After acquiring the subject LMCF, including the facility itself and the associated assets which were amassed under the scrutiny of CON review, the operating entity may exercise its ownership rights and move its property to a new location.

¶ 25 We hold that N.C. Gen. Stat. 131E-184(h) requires an entity which wishes to operate a LMCF to either already own and "reopen" that facility or to "acquire" legal ownership of the facility prior to operating it. When we construe all of chapter 131E together as a whole, the statutory language shows our General Assembly intended for the LMCF exemption to function as a shortcut around the normal CON process where the circumstances inherently guarantee a substantially similar level of healthcare services would be provided to the same geographical area.

IN RE A.L.

[279 N.C. App. 168, 2021-NCCOA-452]

The only way this can occur without additional, considerable review by the Agency is if the entity who wishes to operate a closed LMCF first steps into the shoes of the LMCF's prior operator and acquires the LMCF—a facility which previously endured scrutiny under the normal CON process and received clearance to operate.

III. Conclusion

¶ 26

We hold that the ALJ's final decision was reached upon an erroneous construction of the law. We reverse the ALJ's decision and remand for entry of an order granting the Agency and Sentara's motion for summary judgment, denying FMSH's motion for summary judgment, and requiring FMSH to first acquire Sentara's interests in the Facility before obtaining a CON under section 131E-184(h) and operating the Facility.

REVERSED AND REMANDED.

Judges DILLON and JACKSON concur.

IN THE MATTER OF A.L.

No. COA21-245

Filed 7 September 2021

Child Abuse, Dependency, and Neglect—permanency planning order—eliminating reunification—appeal—premature

A mother's appeal from a permanency planning order ceasing reunification efforts with her daughter was dismissed without prejudice because the appeal was premature under the provisions of N.C.G.S. § 7B-1001(a)(5)(a). Although the mother properly filed written notice preserving her right to appeal the order, pursuant to subsection (a)(5)(a)(1), she filed her notice of appeal from the order before the sixty-five-day period required by subsection (a)(5)(a)(2) had elapsed.

Appeal by respondent-mother from order entered 10 December 2020 by Judge Vanessa E. Burton in Robeson County District Court. Heard in the Court of Appeals 24 August 2021.

J. Edward Yeager, Jr., for petitioner-appellee Robeson County Department of Social Services.

IN RE A.L.

[279 N.C. App. 168, 2021-NCCOA-452]

*Robert C. Montgomery for guardian ad litem.**Peter Wood for respondent-appellant mother.*

ZACHARY, Judge.

¶ 1 Respondent-Mother appeals from a permanency planning order ceasing reunification efforts with her daughter, A.L.,¹ arguing that the trial court abused its discretion by impermissibly delegating to the foster parents (“Guardians”) the court’s responsibility for determining the terms of Respondent-Mother’s supervised visitation. Because we conclude that Respondent-Mother’s appeal is premature and therefore untimely, we dismiss the appeal without prejudice.

I. Background

¶ 2 On 18 July 2019, Petitioner Robeson County Department of Social Services (“DSS”) filed a juvenile petition alleging A.L. to be a neglected juvenile. The case came on for an adjudicatory hearing on 30 October 2019, and the trial court adjudicated A.L. as neglected pursuant to an order entered 21 November 2019. The trial court conducted a dispositional hearing immediately following the adjudication and ordered that A.L. be placed in the legal and physical custody of DSS, with a primary plan of reunification with Respondent-Parents.²

¶ 3 The matter came on for a permanency planning hearing on 9 September 2020. The trial court found that because of A.L.’s health problems, “it would be unsuccessful to attempt to continue to reunite the parents with the juvenile[.]” A.L. “needs a kidney transplant and she cannot be and will not be considered for a transplant if the plan is for reunification to her parents who have consistently failed to show significant substantial improvement in the care of their child.” The trial court, therefore, changed the primary plan to guardianship, and ordered that legal and physical custody of A.L. continue with DSS.

¶ 4 On 12 November 2020, the trial court conducted a review hearing. By order entered 10 December 2020, the trial court ordered, *inter alia*:

1. That legal guardianship of [A.L.] shall be awarded to [Guardians] and there shall be no need for further review in this matter.

1. To protect the identity of the minor child, we refer to her by initials.

2. Respondent-Father is not a party to this appeal; he passed away prior to the entry of the order that is the basis of this appeal.

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. . . .

3. That [Respondent-Parents] shall have supervised visitation with [A.L.] the first Sunday of each month from 12:00 p.m. to 2:00 p.m. [Respondent-Parents] must give a 48 hour notice of their intent to visit and if [Respondent-Parents] are more than 30 minutes late, [Guardians] are not required to wait.

¶ 5 Respondent-Mother filed the statutorily required notice to preserve her right to appeal the trial court's 10 December 2020 review order, N.C. Gen. Stat. § 7B-1001(a)(5)(a)(1) (2019), and on 6 January 2021, Respondent-Mother filed notice of appeal to this Court.

II. Jurisdiction

¶ 6 Prior to the entry of a final order, a parent may appeal from a permanency planning order that eliminates reunification as a primary plan only under certain prescribed circumstances:

1. [The parent h]as preserved the right to appeal the order in writing within 30 days after entry and service of the order[.]
2. [a] termination of parental rights petition or motion has not been filed within 65 days of entry and service of the order[, and]
3. [a] notice of appeal of the order eliminating reunification is filed within 30 days after the expiration of the 65 days.

N.C. Gen. Stat. § 7B-1001(a)(5)(a).

¶ 7 Here, after the trial court ceased reunification as a primary plan, Respondent-Mother filed a written notice preserving her right to appeal the trial court's order, pursuant to N.C. Gen. Stat. § 7B-1001(a)(5)(a)(1). However, when Respondent-Mother subsequently filed notice of appeal from the trial court's 10 December 2020 review order on 6 January 2021, the 65-day period required by N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2) had not yet elapsed. *See id.* § 7B-1001(a)(5)(a)(2). Moreover, there is no indication in the appellate record that a petition to terminate Respondent-Mother's parental rights had been filed. *See id.* As such, Respondent-Mother's appeal is premature and untimely. *See In re A.R. & C.R.*, 238 N.C. App. 302, 305, 767 S.E.2d 427, 429 (2014) (interpreting an earlier version of N.C. Gen. Stat. § 7B-1001(a)(5)—which provided 180 days, rather than 65, within which to initiate a termination of

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parental rights proceeding—and concluding that the statute “operates . . . to delay the date from which notice of appeal may be taken”).

¶ 8 In addition, Respondent-Mother has not petitioned this Court for a writ of certiorari, and the record before us fails to affirmatively establish our jurisdiction to consider the merits of Respondent-Mother’s appeal. Accordingly, we must dismiss Respondent-Mother’s appeal.

III. Conclusion

¶ 9 For the foregoing reasons, we dismiss Respondent-Mother’s appeal without prejudice to her right to refile her appeal as allowed by N.C. Gen. Stat. § 7B-1001(a)(5)(a). *See In re D.K.H.*, 184 N.C. App. 289, 291–92, 645 S.E.2d 888, 890 (2007).

DISMISSED.

Judges MURPHY and GORE concur.

DANIEL S. ISOM, PLAINTIFF
v.
JANEE A. DUNCAN, DEFENDANT

No. COA20-320

Filed 7 September 2021

Child Visitation—denied—best interests of child—findings and evidence—unwillingness to obey court orders

The trial court did not err by denying a mother visitation with her minor daughter where the trial court’s conclusion that visitation with the mother was not in the daughter’s best interests was supported by the findings of fact, which were supported by substantial evidence (even after excluding findings that were not supported by the evidence)—including that the mother showed she was unwilling to obey the orders of the trial court, she had a history of running from authorities and concealing her child, she had caused significant disruptions during visits with her daughter, and she had homicidal and suicidal thoughts.

Appeal by Defendant from order entered 28 May 2019 by Judge Robert J. Crumpton in Wilkes County District Court. Heard in the Court of Appeals 13 April 2021.

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*Tharrington Smith, L.L.P., by Steve Mansbery, for plaintiff-appellee.**Anné C. Wright for defendant-appellant.*

MURPHY, Judge.

¶ 1 We review custody orders to ensure the findings of fact are supported by substantial evidence, and the conclusions of law are supported by the findings of fact. When a finding of fact is unchallenged, it is binding on appeal. Here, the trial court did not err in concluding that prohibiting the mother from exercising visitation with the minor child is in the minor child's best interests because this conclusion is supported by the findings of fact that are supported by substantial evidence in the Record.

BACKGROUND

¶ 2 The minor child, Paula,¹ was born on 28 January 2011 to Mother Defendant-Appellant Janee A. Duncan ("Mother") and Father Plaintiff-Appellee Daniel S. Isom ("Father"). Father and Mother were involved in a romantic relationship before Paula's birth while they were college students in Tennessee but were never married. The couple broke up before Paula was born. Father did not meet Paula until September 2016, when she was five-and-a-half years old, due to Mother hiding Paula from Father and intentionally evading court orders.

¶ 3 The parties' custody battle began in January 2012, when the Hamilton County Superior Court in Indiana ("Indiana Court") entered its *Order Establishing Paternity, Parenting Time, Custody and Support* ("January 2012 Order"). The Indiana Court awarded joint legal custody of Paula to Mother and Father and ordered physical custody to be with Mother. Father was awarded parenting time with Paula pursuant to Indiana Parenting Time Guidelines. When Mother refused to grant Father visitation time with Paula, the Indiana Court entered an order on 5 March 2012 requiring Mother to appear and show cause for her failure to comply with the January 2012 Order. On 31 May 2012, Mother failed to appear at the show cause hearing and, as a result, the Indiana Court issued a *Court Order of Contempt and Writ of Body Attachment* ("May 2012 Order").

¶ 4 For approximately the next four years, Father and his family searched for Mother and Paula and were unsuccessful in locating their

1. A pseudonym is used for the minor child throughout this opinion to protect the identity of the juvenile and for ease of reading.

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whereabouts. Father filed a verified emergency motion for physical custody and motion to appoint a guardian ad litem, which the Indiana Court granted in an order filed 6 September 2016 (“Indiana September 2016 Order”). In the Indiana September 2016 Order, Father was immediately granted temporary physical custody of Paula. Around the same time Father was granted temporary physical custody of Paula, Mother fled with Paula to Ohio, where she stayed with an acquaintance, Jessica Webb. Mother told Webb she “needed a place to stay because the [S]heriff in Hamilton County, Indiana came to her house looking for her and [Paula].” After witnessing Mother’s behaviors, such as using a “burner phone,” researching fake passports, and making Paula use fake names in public, Webb became seriously concerned for Paula’s welfare and decided to contact authorities in Indiana and Ohio.

¶ 5 On 22 September 2016, the Ohio Court of Common Pleas in Washington County filed an order (“Ohio September 2016 Order”) finding Mother “appears to be a flight risk” and ordering temporary custody of Paula to the Washington County (Ohio) Children Services Board (“Ohio CPS”).² Father, having moved back to North Carolina, filed a lawsuit in Wilkes County District Court on 13 October 2016 for custody of Paula and, on the same day, the trial court entered a *Temporary Order* (“October 2016 Order”) awarding Father temporary sole legal and physical custody of Paula, subject to Ohio CPS completing an investigation.

¶ 6 On 31 January 2017, the trial court filed an *Interim Order* (“January 2017 Order”) awarding Father temporary legal and physical custody of Paula and awarding Mother limited supervised visitation for four hours on the second weekend of every month and scheduled phone and video calls with Paula. On 13 October 2017, Mother’s visitation was adjusted to a minimum of one hour per week in the trial court’s *Temporary Custody Order* (“October 2017 Order”), which found:

[Mother’s] actions show that she willfully and intentionally kept [Paula] from [Father]. [Mother] willfully and intentionally attempted to avoid the jurisdiction of the Indiana Courts. [Mother’s] explanations for missing Court, moving, not receiving notices,

2. At this point in September 2016, both the Ohio and Indiana courts had been involved in the custody dispute and a jurisdictional issue arose that is not at issue in this appeal. Ultimately, North Carolina acquired jurisdiction in accordance with a *Jurisdictional Order* filed in Wilkes County District Court on 25 September 2017, recognizing “Wilkes County Civil District Court has personal and subject matter jurisdiction in these causes, and has authority to enter such Orders as may be necessary regarding modification of custody, child support, or otherwise regarding the minor child, [Paula].”

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discrepancies in affidavits and testimony and using false names are wholly unbelievable. Her actions were a conscious effort to keep [Father] from [Paula] and were without excuse. [Mother] ignored the authority of the Courts in Indiana. She moved to Ohio in an attempt to avoid the Court. She had [Paula] use false names to help avoid the Court. [The trial court] has no assurances that [Mother] would follow the Orders of [the trial court] if given unsupervised visitations. [Mother] argues that she has submitted to [the trial court's] jurisdiction and realizes that if she left the State in violation of an Order of [the trial court] that she could be charged with a felony and arrested. However, the Court in Indiana issued at least two separate orders for her arrest and she avoided law enforcement and the Court for 5 years.

¶ 7 Beginning in February 2017, Mother participated in supervised visits with Paula at SonShine Child Care Center, Incorporated (“SonShine Child Care”) and Our House in Wilkesboro. A visitation supervisor indicated that while most visits with Mother and Paula were “appropriate,” Mother violated the Our House guidelines by pulling out a camera phone and taking a photograph of a bruise on Paula. Similarly, there was an incident on 31 July 2018 at SonShine Child Care where Mother violated the facility guidelines when she let an off-duty police officer into the facility despite warnings from the staff. In August 2018, Father filed a motion to suspend or terminate Mother’s visitation.

¶ 8 The trial court filed an *Order* on 28 May 2019 (“May 2019 Order”). The May 2019 Order decreed “[Father] shall have and exercise the sole legal and physical, custody, care and control of [Paula]”; “[Mother] shall not have any visitation with [Paula], but she shall be entitled to have phone call or Facetime video call contact with [Paula] one time per week each Saturday for 10 minutes [and] . . . a similar call for the same time on each Christmas, Thanksgiving, Easter and birthday of [Paula].” Mother timely appealed from the May 2019 Order.

ANALYSIS

¶ 9 The ultimate issue on appeal is whether the trial court erred in denying visitation between Mother and Paula. “It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody[.]” *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998), and therefore, “[w]e review an order denying visitation for

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abuse of discretion.” *In re J.R.S.*, 258 N.C. App. 612, 616, 813 S.E.2d 283, 286 (2018). The reason for an abuse of discretion standard of review is because the trial court “has the opportunity to see the parties in person and to hear the witnesses The trial court can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.” *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 527 (2016) (marks omitted). The trial court’s decision will be “reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 10 Further, “[i]n a child custody case, the trial court’s findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings.” *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Mitchell v. Mitchell*, 199 N.C. App. 392, 405, 681 S.E.2d 520, 529 (2009). “Unchallenged findings of fact are binding on appeal. Whether the trial court’s findings of fact support its conclusions of law is reviewable *de novo*. If the trial court’s uncontested findings of fact support its conclusions of law, we must affirm the trial court’s order.” *Scoggin*, 250 N.C. App. at 118, 791 S.E.2d at 526 (marks omitted).

¶ 11 Mother’s ultimate argument on appeal is “[t]he trial court erred in denying visitation between [Paula] and her mother.” We disagree with Mother’s contentions, especially in light of Finding of Fact 36.

A. Challenged Findings of Fact

¶ 12 On appeal, Mother challenges Findings of Fact 6, 15, 22, 23, 25, 27, 37, 38, and 39, as well as Conclusion of Law 4. Specifically, Mother contends Findings of Fact 23, 25, and 27 are not supported by the evidence in the Record. Mother also mentions Findings of Fact 15, 22, 37, and 38 in her brief, but does not argue these findings are unsupported by the evidence.

1. Findings of Fact Challenged as Unsupported by the Evidence

¶ 13 Finding of Fact 23 states:

23. Once [Paula] was safely returned to the care of [Father] in North Carolina, [Mother] did not initially exercise visits. Eventually, supervised visitation was set up through SonShine Child Care and Our House in Wilkesboro as described in the Temporary and Interim Orders in this cause. Visits at both locations became problematic due to [Mother’s] behavior and

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complaints at each location. Neither facility will agree to supervise visits any longer in this case.

Mother only challenges the first sentence of Finding of Fact 23—“[o]nce [Paula] was safely returned to the care of [Father] in North Carolina, [Mother] did not initially exercise visits.” Mother argues she “had no visitation rights to exercise until the entry of the trial court’s [January 2017 Order] on 31 January 2017 as the trial court’s [October 2016 Order] did not provide for any visitation rights.”

¶ 14 The Record reflects Mother was first granted temporary supervised visitation in the January 2017 Order. Mother testified she began supervised visits at Our House in February 2017. The January 2017 Order was entered on 31 January 2017 and, while it is unclear when exactly in February the visits began, it is clear from the Record Mother initially exercised her visitation with Paula immediately. The challenged sentence of Finding of Fact 23 is unsupported by the evidence, and the trial court erred by making this finding. We strike the portion of Finding of Fact 23 that states: “Once [Paula] was safely returned to the care of [Father] in North Carolina, [Mother] did not initially exercise visits.” *See State v. Messer*, 255 N.C. App. 812, 825, 806 S.E.2d 315, 324 (2017) (“This portion of the finding is not supported by substantial evidence. Accordingly, we strike this portion of the finding.”).

¶ 15 However, striking this portion of Finding of Fact 23 does not affect the sufficiency of the remaining supported findings of fact to support the trial court’s conclusion of law. Omitting this portion of the finding, the trial court’s conclusion of law that “[i]t is not in [Paula’s] best welfare and interests that [Mother] exercise any visitation” is still supported by the remaining abundant and detailed findings of fact, which are supported by substantial evidence as discussed in further detail below. *See In re E.M.*, 249 N.C. App. 44, 49, 790 S.E.2d 863, 869 (2016) (“[T]he inclusion of an erroneous finding of fact is not reversible error where the [trial] court’s other factual findings support its determination.”).

¶ 16 Finding of Fact 25 states, in pertinent part:

25. Likewise, Tracy Lowder, the Director of SonShine Child Care, also testified at [the] hearing. Mrs. Lowder indicated that although [Mother] was supplied with the Rules for the facility, [Mother] refused to sign them. Mrs. Lowder also testified that although [Mother] was appropriate for most visits, there were several times when [Mother] had to be cautioned regarding rule violations, including bringing other persons

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into the facility who were not supposed to be part of the visit, whispering to [Paula], taking photographs, and becoming belligerent with staff. *Eventually, visits at this location were also terminated due to [Mother's] behavior.*

(Emphasis added).³ In challenging Finding of Fact 25, Mother argues visits at SonShine Child Care “stopped after [Mother] moved to North Carolina because the visits then became weekly and could all be accommodated by Our House.”

¶ 17 Although visits may have stopped at SonShine Child Care because they became weekly and could all be accommodated by Our House, there is substantial evidence in the Record to support the finding that visits at SonShine Child Care were “*also* terminated due to [Mother's] behavior.” (Emphasis added). Tracy Lowder, the Director of SonShine Child Care, testified as follows:

[FATHER'S COUNSEL:] All right. So . . . is it the intention of SonShine [Child Care] to offer any further visitation –

[LOWDER:] No.

[FATHER'S COUNSEL:] -- at those premises?

[LOWDER:] No, sir.

[FATHER'S COUNSEL:] Okay. At least not to [Mother]?

[LOWDER:] Right.

[FATHER'S COUNSEL:] And you indicated several things. Was the fact that she let a visitor into the premises, is that a violation of your policy?

[LOWDER:] Yes, it's a huge violation. She's let a visitor in before, but I was able to contain that visitor in a locked portion of the building. This visitor came into the supervised area portion of the building which is not allowed. I have no way of watching two people at the same time. I had to keep my back to this visitor, and I was very uncomfortable having her stand behind me the whole time.

3. Mother only challenges the portion of Finding of Fact 25 that states: “Eventually, visits at this location were also terminated due to [Mother's] behavior.”

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[FATHER'S COUNSEL:] In addition to that, what about the discussion and saying things like [Father] is a rapist, [Father is] a violent abuser, is [Mother] saying those sorts of things in front of [Paula]?

[LOWDER:] Yes, she was saying those where [Paula] could hear what was being said.

[FATHER'S COUNSEL:] Is that also a violation of your policies?

[LOWDER:] It is.

[FATHER'S COUNSEL:] *And for those reasons alone you would not allow her back?*

[LOWDER:] *Exactly.* Some of the violations that she's had in the past like not volunteering her keys, the cell phone, those are minor and they're not going to harm [Paula]. But this attack on a parent, that is very psychologically harmful, and so that is something that we can't tolerate.

[FATHER'S COUNSEL:] Were you concerned at any point that [Mother] was trying to flee the premises with [Paula]?

[LOWDER:] Yes. By letting a visitor into the building, she had no idea that there is another person in the building that could assist me with the visitation until she arrived. So letting that other person in there was a huge violation and was definitely something that I was very concerned with. It would have been easy for the two of them to take [Paula] out of the premises if I had been by myself.

(Emphases added). This testimony explicitly states Mother was not allowed to continue visitation at SonShine Child Care because of her behavior and violations of the facility's rules. While the trial court's timeline implied by Finding of Fact 25 is incorrect, it does not impact the validity of the finding of fact that visits were ultimately terminated because of Mother's behavior.

To the extent that Finding of Fact 25 suggests the initial cessation of visitation at SonShine Child Care was due to Mother's behavior, the finding of fact is unsupported by evidence in the Record. However, there is substantial evidence in the Record to support the trial court's finding

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that “[e]ventually, visits at [SonShine Child Care] were *also* terminated due to [Mother’s] behavior.” (Emphases added). Finding of Fact 25 is binding on appeal.

¶ 19

Finding of Fact 27 states:

27. Two local Wilkesboro police officers investigated the [31 July 2018] incident and allowed [Paula] to be released into the custody of [Father], despite the strong protests of [Mother], who made the statement: “*I am not leaving Wilkes County tonight without my child.*” [Mother] then insisted that Wilkes DSS be called, and the officers did so.

(Emphasis added). The 31 July 2018 incident referred to in Finding of Fact 27 is detailed in Findings of Fact 25 and 26:

25. . . . The last visit at SonShine [Child Care] occurred on [31 July 2018]. Just prior to that visit, [Father] had gotten married and traveled with his new wife out of town on their honeymoon. [Mother] knew [Father] had left for his honeymoon Unbeknownst to SonShine [Child Care] staff, [Mother] had hired an off-duty, Hickory police officer . . . to show up toward the end of the visit on [31 July 2018]. Near the end of the visit, [Mother] saw a very small faint bruise on [Paula] . . . and insisted on lifting up [Paula’s] shirt and taking a photograph. [Lowder] objected and told [Mother] that this was against the Rules of the facility. [Mother] persisted so much that [Paula] became very upset, “shut down,” and started hiding under the table.

26. The circumstances of the [31 July 2018] visit was [sic] recorded by SonShine [Child Care] security cameras. . . . Toward the end of the visit, [Mother] began texting [the off-duty police officer] several times, urging her to come to the facility. [Mother] then exited the visitation room and began going to different doors in an effort to let [the off-duty police officer] into the facility, which was also against the rules. [Lowder] cautioned [Mother] several times to stop this behavior and to not let anyone in, but [Mother] ignored her and proceeded to let [the off-duty police officer] come in. [Paula] exited the visitation room, came into the hallway, and was near the side

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doorway when [Lowder] grabbed her hand and ushered her back into the room. [Lowder] was fearful that [Mother] was trying to remove [Paula] from the facility. At this point, [Lowder] felt that things were getting out of hand and contacted [Father's] family. [The off-duty police officer] had by that time called the local Wilkesboro police department. Authorities arrived, as did [Father] and his family. During this time, [Mother] was making negative comments about [Father] within the hearing of [Paula], which is also against SonShine [Child Care] rules. [Lowder] read her own Affidavit . . . into evidence at the hearing, and the [trial court] incorporates the same by reference into these findings of fact.

¶ 20 Mother argues there is no evidence that she made the statement “I am not leaving Wilkes County tonight without my child.”

¶ 21 Mother testified to the following:

[FATHER'S COUNSEL:] Well, you made the statement that night that, “I’m not leaving Wilkes County without my daughter”? You made that statement, didn’t you?

[MOTHER:] Sir, I have that recorded, and I did not make that statement at any point in time.

Father argues that because the trial court found Mother’s testimony to be not credible, the trial court can draw the inference that Mother was lying when she testified that she did not make the statement, “I’m not leaving Wilkes County without my daughter.” Father’s argument does not correctly state the law.

¶ 22 “It is well settled that questions asked by an attorney are not evidence. Similarly, a question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind.” *State v. Richardson*, 226 N.C. App. 292, 303, 741 S.E.2d 434, 442 (2013) (marks and citations omitted). As a result of the fact that Mother denied saying the statement “I’m not leaving Wilkes County without my daughter[,]” the Record contains no evidence that Mother made the statement “I am not leaving Wilkes County tonight without my child” from Finding of Fact 27.

¶ 23 The portion of Finding of Fact 27 that states Mother “made the statement: ‘I am not leaving Wilkes County tonight without my child’ ” is not

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supported by evidence in the Record. However, this portion of Finding of Fact 27 is not essential to the ultimate issue on appeal. *See In re A.Y.*, 225 N.C. App. 29, 41, 737 S.E.2d 160, 167 (“We agree that this [portion of the] finding of fact is [not] supported by competent evidence. . . . This error is, however, harmless.”), *disc. rev. denied*, 367 N.C. 235, 748 S.E.2d 539 (2013).

2. Other Challenged Findings of Fact

¶ 24 Mother also challenges Findings of Fact 15, 22, 37, and 38, but does not argue these findings are unsupported by evidence in the Record. Rather, Mother appears to argue the trial court erred in using these findings to support its ultimate conclusion that “[i]t is not in [Paula’s] best welfare and interests that [Mother] exercise any visitation.” “A party abandons a factual [argument] when she fails to argue specifically in her brief that the contested finding of fact was unsupported by the evidence.” *Peters*, 210 N.C. App. at 16, 707 S.E.2d at 735. Consequently, Findings of Fact 15, 22, 37, and 38 are binding on appeal. Nevertheless, we address each of these findings of fact, and Mother’s corresponding argument in her brief, in sequential order and conclude they are supported by substantial evidence.

¶ 25 Finding of Fact 15 states:

15. [Mother] began making various statements to and in front of [Webb] which began to alarm [Webb]. For instance, [Mother] said several times, and in a serious manner, that she regretted not inviting [Father] to her house under the pretense of discussing custody, and then killing him and making it look like self-defense. [Mother] also admitted to [Webb] that she had a gun. [Mother] told [Webb] that she “understood how moms could kill their children.” [Mother] confided to [Webb] that she was “desperate,” and wanted to just drown in the river and die so that she would not have to deal with these problems. She described wanting to “float away with [Paula] to be with God.” [Webb] interpreted these to be suicidal and homicidal ideations. [Webb] became increasingly alarmed about [Mother’s] mental health.

¶ 26 Finding of Fact 22 states:

22. The [trial court] finds that at the time of [Paula’s] recovery in Ohio, [Mother] was actively researching

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for ways to flee the United States by use of fake passports and ID's for herself and [Paula]. This is very troublesome for the [trial court] since [Mother] had already demonstrated a proclivity and ability to readily avoid court orders, arrest warrants, and hearings during the 5 ½ years that she had [Paula]. Coupled with the fact that [Mother] has contemplated killing [Father], has had access to a gun, and has had homicidal and suicidal thoughts regarding [Paula] and herself, the [trial court] believes [Mother] constitutes a significant on-going flight risk with [Paula], as well as a potential threat of harm to [Paula] and others.

¶ 27

In her brief, Mother addresses Findings of Fact 15 and 22 together:

Presumably the comments to which the trial court refers [to in Finding of Fact 22] are the one[s] that [Mother] made in 2016 as referenced in [Finding of Fact] number 15. No doubt many divorced, or otherwise estranged parents, have voiced that they would like to kill the other parent of their children or that they wish they would die so they didn't have to deal with a problem. Adults often make such hyperbolic statements to one another. The ones in this case were made several years before the [May 2019 Order] was entered and are not indicative of any actual threat to [Paula].

Mother tries to minimize the impact of these statements on the welfare of Paula. However, both findings of fact are supported by testimony from Webb that Mother said to her “*several times, and in a serious manner*, that she regretted” not killing Father and making it look like self-defense. (Emphasis added). Webb testified to the following:

[FATHER'S COUNSEL:] Would you please tell us about any observations by you that [Mother] in any manner threatened [Father's] life?

[WEBB:] She expressed on more than one occasion that she regretted not inviting him to her home under the -- with him under the impression that they were going to discuss custody or him meeting [Paula]. And she would ask him to come into the house and provoke a fight and shoot him and kill him.

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And she regretted not doing that. Because she felt like now she had to be on the run to avoid him and it would have been much simpler if she could have just killed him.

[FATHER'S COUNSEL:] Okay. So did she describe to you a very real and detailed plan to lure [Father] into her home so she could pretend that there was some type of attack and she would shoot him in self-defense?

[WEBB:] Yes.

[FATHER'S COUNSEL:] How many times during her nine-day stay with you did she mention that plan?

[WEBB:] Three or four.

[FATHER'S COUNSEL:] And how seriously did you take that threat?

[WEBB:] I could tell she was very serious when she said it. She said it very casually.

[FATHER'S COUNSEL:] Like she was unemotional?

[WEBB:] Yes.

[FATHER'S COUNSEL:] And what behaviors did you observe in [Mother] that made you believe [Mother] would follow through with a plan like that?

[WEBB:] During the time that she was at my house, she became increasingly more desperate. And I think that desperate people do desperate things. And she – I very much believed her when she said she regretted not just what she called, “Doing it the easier way.” Which was killing him.

[FATHER'S COUNSEL:] Okay. At this point, were you concerned about the state of [Mother's] mental health?

[WEBB:] Yes.

[FATHER'S COUNSEL:] And you specifically mentioned her shooting [Father]. Were you aware that [Mother] had ever owned a gun?

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[WEBB:] Yes. She said that she had a gun in the house.

....

[FATHER'S COUNSEL:] At some point during that nine-day stay with you, did [Mother] make a comment to you that she now understood how mothers can kill their children?

[WEBB:] Yes.

[FATHER'S COUNSEL:] When did she say that?

[WEBB:] It was probably the fifth or sixth day. It was more than halfway through her stay.

[FATHER'S COUNSEL:] And what prompted that statement?

[WEBB:] She was talking to [a friend] and I. [The friend] had come to my house to visit, and we were -- the kids were in bed and we were on the couch, just talking. And [Mother] was going through different possibilities, "Should I go to Japan? Should I go to Canada? Should I try to get a fake passport?" And every option she would say what complications there would be. "Well, I don't know how to get a fake passport." You know, "I'm going to Google how to do this." And, "I don't know how I would have money to go to Japan."

So every suggestion that -- that [Mother] came up with herself, there was a major problem with. And so she was just getting upset. . . .

....

[FATHER'S COUNSEL:] At that point in time, were you fearful for the safety of [Paula]?

[WEBB:] Yes.

....

[FATHER'S COUNSEL:] Did [Mother] make a comment to you that she wishes that she and [Paula] could just float away to be with God?

[WEBB:] Yes.

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[FATHER'S COUNSEL:] How many times did [Mother] say that to you?

[WEBB:] Three or four times.

[FATHER'S COUNSEL:] And what did that mean to you?

[WEBB:] It mean [sic] that she wished they could drown in the river and die and not have to deal with the problems anymore is what she said. And I have a river in my backyard. So obviously that was a little specific for my comfort.

¶ 28 The trial court found in Finding of Fact 11 “the testimony of [Webb] [is] credible. [Webb] had no reason or motivation to lie or be deceptive with the [trial] court.” Mother did not challenge this finding of fact and it is therefore binding. *See Scoggin*, 250 N.C. App. at 118, 791 S.E.2d at 526. Webb’s testimony is substantial evidence in the Record to support Findings of Fact 15 and 22. These findings are binding on appeal.

¶ 29 Finding of Fact 37 states:

37. Due to [Mother’s] behaviors, the [trial court] cannot allow unsupervised visitation with [Paula]. The [trial court] finds that if [Mother] has unsupervised visits with [Paula], she will likely flee again with [Paula]. She has shown by her past actions that she will not follow Court orders.

¶ 30 In her brief, Mother addresses Finding of Fact 37 by arguing:

The trial court found that “if the mother has unsupervised visitation with [Paula], she will likely flee again with [Paula].” After [Paula] came into [Father’s] custody, [Mother] moved to North Carolina. She began working fulltime as a First Steps Domestic Violence Case Manager in May 2017 and was still so employed at the time of the hearings at issue. She rented a home which was appropriate and adequately sized. The trial court found that [Mother] evaded service and disobeyed court orders in an attempt to keep [Father] out of [Paula’s] life.

Though [Mother] testified, to the contrary that to her knowledge, [Father] never sent any letters, holiday gifts, child support or otherwise showed that

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he wanted to have anything to do with [Paula], “it is within the trial court’s discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.” *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). However, the trial court’s concerns regarding the possibility that [Mother] would flee with [Paula] are adequately addressed by limiting visitation to supervised visitation within the home county. *See Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985)[.]

(Record citations omitted). Mother’s argument suggests the trial court could have made a different finding in regard to unsupervised visitation and is asking this Court to reweigh the evidence in favor of Mother. However, this we cannot do, as our authority is limited to determining whether the “trial court’s findings of fact are . . . supported by substantial evidence[.]” *Peters*, 210 N.C. App. at 12, 707 S.E.2d at 733. Findings of fact supported by substantial evidence are conclusive on appeal “even if there is sufficient evidence to support contrary findings.” *Id.* at 12-13, 707 S.E.2d at 733. As Mother acknowledges, it is not for us to reweigh the evidence to determine what the trial court could have done.

¶ 31 There is substantial evidence in the Record to support Finding of Fact 37. As discussed above, there is credible testimony in the Record to support Finding of Fact 22, and that finding of fact is binding on us. Finding of Fact 22 states Mother’s past and present actions, including her “proclivity and ability to readily avoid court orders,” her research about fake passports, her access to a gun, and her mental health constitute an “on-going flight risk with [Paula], as well as a potential threat of harm to [Paula].” The trial court did not err in finding “the [trial court] cannot allow [Mother to exercise] unsupervised visitation with [Paula]” and “if [Mother] has unsupervised visits with [Paula], she will likely flee again with [Paula].” Finding of Fact 37 is binding on appeal.

¶ 32 Finding of Fact 38 states:

38. In a normal situation, the supervisor that [Mother] suggested would be appropriate. However, given [Mother’s] actions at Our House and Son Shine Child Care, coupled with her past actions, lead the [trial court] to conclude that it would be impossible for her supervisor to be able to control her and prevent her from fleeing with [Paula].

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¶ 33 In her brief, Mother quotes Finding of Fact 38 and argues:

The supervisor suggested by [Mother] was someone [Mother] knew from church, Lydia. Lydia was a stay-at-home mother with four children, two of whom were adopted. There was no evidence indicating in any way that Lydia was under a disability or suffered from any other condition which would render her unable to alert the authorities if [Mother] tried to flee with [Paula].

(Citations omitted). Again, Mother's argument suggests we should reweigh the evidence in her favor. While the trial court could have pursued a different course of action with regard to who would supervise visitation, it chose not to do so, and we will not disturb that finding of fact as long as there is substantial evidence in the Record to support the finding.

¶ 34 Finding of Fact 38 is supported by substantial evidence in the Record, including unchallenged Findings of Fact 26 and 36. Finding of Fact 26 states:

26. . . . Toward the end of the visit [at SonShine Child Care], [Mother] began texting [an off-duty police officer she hired] several times, urging her to come to the [SonShine Child Care] facility. [Mother] then exited the visitation room and began going to different doors in an effort to let [the off-duty police officer] into the facility, which was also against the rules. [Lowder] cautioned [Mother] several times to stop this behavior and to not let anyone in, but [Mother] ignored her and proceeded to let [the off-duty police officer] come in. [Paula] exited the visitation room, came into the hallway, and was near the side doorway when [Lowder] grabbed her hand and ushered her back into the room. [Lowder] was fearful that [Mother] was trying to remove [Paula] from the facility. At this point, [Lowder] felt that things were getting out of hand and contacted [Father's] family. [The off-duty police officer] had by that time called the local Wilkesboro police department. Authorities arrived, as did [Father] and his family. During this time, [Mother] was making negative comments about [Father] within the hearing of [Paula], which is also against SonShine [Child Care] rules. [Lowder] read

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her own Affidavit . . . into evidence at the hearing, and the [trial court] incorporates the same by reference into these findings of fact.

Finding of Fact 26 shows that Lowder, a neutral third-party, had a challenging time supervising Mother during her visits with Paula and feared Mother would flee with Paula. Based on this, there was substantial evidence to support the trial court’s finding of fact that “it would be impossible for [Mother’s] supervisor to be able to control her and prevent her from fleeing with [Paula].”

¶ 35 Finding of Fact 36 also supports Finding of Fact 38. In Finding of Fact 36, the trial court found “[Mother] will not follow the orders of [the trial court].” Even if the trial court were to allow Mother to choose the supervisor for her visits with Paula, this unchallenged finding of fact suggests Mother would not respect and obey the supervisor. There is substantial evidence in the Record to support Finding of Fact 38. This finding of fact is binding on appeal. We now address Mother’s challenged conclusions of law.

B. Challenged Conclusions of Law

¶ 36 Mother challenges Findings of Fact 6 and 39 as at least partial conclusions of law. We agree that portions of Finding of Fact 6 and the entirety of Finding of Fact 39 are more properly labeled as conclusions of law.

[T]he labels “findings of fact” and “conclusions of law” employed by the lower tribunal in a written order do not determine the nature of our standard of review. . . . [I]f the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that “finding” as a conclusion *de novo*.

In re V.M., 273 N.C. App. 294, 298, 848 S.E.2d 530, 534 (2020) (marks and citation omitted). “The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law.” *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted).

¶ 37 Finding of Fact 6 states, in relevant part:

6. . . . [Father] is a loving, fit and suitable custodian for [Paula], and it is in the best interests and welfare

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of [Paula] that she remain in the permanent, sole, legal and physical, care, custody and control of [Father]. *It is not in [Paula's] best welfare or interests that she have any visitation with [Mother].*

(Emphasis added).

¶ 38 Finding of Fact 39 states:

39. Pursuant to [N.C.G.S. §] 50-13.5(i), the [trial court] finds that *it is not in the best interest of [Paula] to allow [Mother] visitation* because of the high probability that [Mother] will remove and secret [Paula] from the jurisdiction of the [trial court].

(Emphasis added).

¶ 39 Both Findings of Fact 6 and 39 conclude it is not in Paula's best welfare and interests that Mother exercise any visitation. In making this determination, the trial court applied legal analysis to the facts and concluded it is not in Paula's best interest to have visitation with Mother. This conclusion required the exercise of judgment and is more properly classified as a conclusion of law, rather than a finding of fact. *See In re J.R.S.*, 258 N.C. App. at 617, 813 S.E.2d at 286 (marks omitted) ("A determination regarding the best interest of a child is a conclusion of law because it requires the exercise of judgment."); *see also Huml v. Huml*, 264 N.C. App. 376, 400, 826 S.E.2d 532, 548 (2019). As Findings of Fact 6 and 39 are more properly classified as conclusions of law, we review them de novo to determine whether they are supported by the findings of fact.

¶ 40 Mother challenges Findings of Fact 6 and 39 and Conclusion of Law 4 as not being "adequately supported by the competent findings of fact." Similar to Findings of Fact 6 and 39, Conclusion of Law 4 states: "It is not in [Paula's] best welfare and interests that [Mother] exercise any visitation." As Findings of Fact 6 and 39 and Conclusion of Law 4 all make the same conclusion, that it is not in Paula's best interests for Mother to exercise visitation, we address them together.

¶ 41 "We review an order denying visitation for abuse of discretion." *In re J.R.S.*, 258 N.C. App. at 616, 813 S.E.2d at 286; *see Huml*, 264 N.C. App. at 389, 826 S.E.2d at 541-42 ("If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing cus-

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tody agreement.”). A trial court may deny visitation to a noncustodial parent if the parent is an unfit person to visit the child or it is in the best interests of the child to deny visitation. *See* N.C.G.S. § 50-13.5(i) (2019) (“[T]he trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.”).

Our courts have long recognized that sometimes, a custody order denying a parent all visitation . . . with a child may be in the child’s best interest[.] . . . The welfare of a child is always to be treated as the paramount consideration. Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child’s welfare.

Huml, 264 N.C. App. at 399, 826 S.E.2d at 548; *see also In re Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 848-49 (1971) (emphasis omitted) (“The rule is well established in all jurisdictions that the right of access to one’s child should not be denied unless the [trial] court is convinced such visitations are detrimental to the best interests of the child.”).

¶ 42

The trial court’s findings of fact support its conclusion in Findings of Fact 6 and 39 and Conclusion of Law 4 that “[i]t is not in [Paula’s] best welfare and interests that [Mother] exercise any visitation.” Findings of Fact 6 and 39 and Conclusion of Law 4 are supported by ample unchallenged findings of fact in the Record, including Findings of Fact 7, 9, 10, 11, 12, 13, 14, 16, 21, 33, 34, 34,⁴ and 36. Those unchallenged findings of fact state:

7. [Father] first met [Paula] in September of 2016 at the Washington County Ohio CPS Office after [Paula] was recovered by authorities after 5 ½ years with [Mother]. [Father] and his family had searched for 5 ½ years for [Paula] . . . Prior to September of 2016, [Mother] and her family had denied all contact of [Father] with [Paula] and had actually hidden and secreted [Paula] and [Mother] from [Father] with the logistical and financial aid of [Mother’s] family. Pending release to the care of [Father] by Ohio CPS,

4. The May 2019 Order contains two findings of fact numbered “34.”

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[Paula] stayed in foster care for a period of time in Ohio while awaiting a decision by the courts. While [Paula] was in Ohio CPS custody, [Mother] stated in a phone call to [Father] on [25 September 2016] that she had received a spiritual epiphany and now suddenly wanted [Father] to be involved in [Paula's] life.

....

9. At the time [Paula] came into the care of [Father], neither a birth certificate nor a social security number had ever been issued for [Paula], even though Indiana law required that a birth certificate be issued within 5 days. [Mother] intentionally refused to have this done for 5 ½ years. [Father] has now obtained both a delayed certificate of birth and social security number for [Paula].

10. Since living with [Father], [Paula] has exhibited no signs of multiple allergies nor needed any treatment for same, even though [Mother] insisted that [Paula] had numerous allergies of all types during the 5 ½ years that she was in [Mother's] care. [Paula's] counselor and doctor testified that these alleged "allergies" were another form of "control" exercised by [Mother] over [Paula]. During [these] 5 ½ years, [Mother] also refused to vaccinate [Paula], or get her dental care, or medical care of any kind. [Mother] only had [Paula] seen by chiropractors and "holistic" practitioners. Although the [trial] court realizes that parents have a right not to immunize their children, [Mother] gave conflicting testimony about why she refused to do so, first stating in her Interrogatory Answers that it was due to egg allergies, and then stating that it was due to her religious beliefs. [Mother] told Ohio DSS that [Paula] liked to eat eggs. She also told Ohio DSS that [Paula] had numerous food allergies and sensitivities but did not mention an egg allergy The [trial] court finds that [Mother's] beliefs that [Paula] had numerous allergies were completely unfounded, and that she actually endeavored to keep [Paula] from having medical records in order to help secret the child. Since acquiring custody,

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[Father] has made sure that [Paula] has received all of her vaccinations, medical check-ups and treatment.

11. The [trial] court heard extensive testimony from [Father's] witness, [Webb], by video deposition. [Webb] is an acquaintance whom [Mother] met in college, but with whom she had no intervening contact for many years. In September of 2016, [Webb] was contacted by a mutual friend named Megan Buskirk, who said that [Mother] and [Paula] needed a place to stay in Ohio. [Mother's] mother, Karen Duncan, then drove [Mother] and [Paula] from Indiana to Ohio late at night on [12 September 2016]. They arrived at the Webb home under cover of darkness and drove straight inside a garage, so they would not be seen. [Karen Duncan] stayed overnight that night, too. This sudden trip to Ohio coincided with a recent "body attachment" and Order for Contempt which had just been issued by the courts in Indiana for [Mother] and [Paula] on [30 August 2016]. [Mother] and [Paula] remained at the Webb home for 9 days, from [12 September] through [21 September 2016]. During this time, [Webb] observed and communicated with [Mother] and [Paula] extensively. The [trial] court finds the testimony of [Webb] to be credible. [Webb] had no reason or motivation to lie or be deceptive with the [trial] court. She received no compensation or reward from [Father] or his family. If [Webb] had been testifying for money, then she would have given [Father] her information and location immediately when she first spoke with him. Instead, she waited and provided this information to [Father's] father.

12. [Mother] told [Webb] that she needed a place to stay because the [S]heriff in Hamilton County, Indiana came to her house looking for her and [Paula]. [Mother] also confided to [Webb] that she did not want to be found in Indiana. [Mother] told [Webb] that she wanted to keep [Paula] from [Father] because he and his family were "bad people." She regularly referred to them as "the crazies." Karen Duncan had said the same thing to [Webb] the night that Karen stayed at the Webb home. [Mother] told

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[Webb] that she knew about court in Indiana and the “body attachment,” but had no intention of going to Court. She also knew that [Father] and police were looking for her. [Mother] was tense and nervous during her stay at the Webb home. [Webb] did not know at first if what [Mother] was telling her about [Father’s] family was true or not. The longer [Mother] stayed, the more [Webb] realized that [Mother] was lying and/or exaggerating. Although [Webb] did not want to be involved, she began to become seriously concerned for the welfare of [Paula] the more she heard from [Mother] and the more she learned on the internet about [Paula’s] situation.

13. [Mother] had two cell phones while she was at the Webb home. [Mother] admitted that one of these phones was a “burner phone” which was not traceable. During her stay, [Mother] frequently talked to her lawyer, her mother, and her sister, Tiffany Duncan Midkiff, on these phones. [Mother] also admitted to [Webb] that she wanted to flee the country with [Paula] but could not afford to do so. [Mother] used the internet at [Webb’s] home to actively research Japan and Canada and other countries which would not extradite her and [Paula]. [Mother] also researched fake passports for herself and [Paula] and discussed this five or more times with [Webb]. The [trial] court believes this testimony and does not find that [Webb] in any manner initiated or encouraged the idea of fleeing the country with [Paula].

14. During their nine day stay at the Webb home, [Mother] and [Paula] would not go outside much due to [Mother’s] concern with being discovered. [Mother] admitted that when she did take [Paula] out in public she made [Paula] use false names like “Zoe” and “Eleanor.”

....

16. One afternoon [Webb] came home and found both [Mother] and [Paula] missing. When she searched and could not find them in the home, she walked down toward the river and found them walking back from

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there. When [Webb] confronted [Mother], [Mother] acted guilty like she had been “caught.” At this point, [Webb] decided that [Mother] may pose a real and serious threat to [Paula]. [Webb] then contacted both the Ohio and Indiana Sheriff’s Departments multiple times. After getting no immediate response, she contacted [Father’s] family. This ultimately led to the recovery of [Paula] shortly thereafter by Ohio authorities. Once [Paula] had been recovered, [Mother] made the statement to [Webb] that she would “like to kill whoever turned her in to DSS.”

....

21. [Mother] intentionally violated court orders and avoided arrest for 5 ½ years. She deliberately concealed [Paula] with the active aid and support of her family, including her mother and sister who lied to the Court in Indiana about the presence of [Mother] and [Paula]. [Mother] testified that both her mother, Karen Duncan, and her sister, Tiffany Midkiff, lied at a [30 May 2012], hearing in Indiana regarding the presence of both [Mother] and [Paula] at their Indiana home. Further, [Mother] admitted that numerous letters from [Father’s] counsel . . . which had been sent to the Noblesville address and other addresses of [Mother] had all been rejected and “returned to sender.” [Mother] stated that she was actually living at each address at the time, and that the writing on the letters to return them was her “mother’s” handwriting. It is obvious to the [trial court] that [Mother] had to be aware of the Court proceeding in Indiana on [30 May 2012], since both her mother and sister showed up at that time and testified. [Mother] testified that her mother and sister did not tell her they went to the [30 May 2012] hearing until 2015. However, [the trial court] does not believe her. It is also obvious to the [trial court] that each time the authorities closed in on [Mother] and her family, that the family would simply move [Mother] and [Paula] to another location. In fact, for one 5-month period (from April of 2012 to August of 2012), Karen Duncan paid for [Mother] and [Paula] to live in extended stay

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hotels in various areas of Indianapolis, Indiana, solely to avoid an outstanding body attachment and court proceedings in Indiana. Since [Mother] had no regular job or visible means of support, she was entirely dependent upon her family for the support of herself and [Paula] during this time. It is also obvious that [Mother] was in regular contact with her family during this entire time since she required their regular aid and assistance.

. . . .

33. Both [Paula's doctor,] Dr. Wilson[,] and [Paula's counselor,] Counselor Griffin[,] further opined that such deceptive behavior by [Mother] was actually a mechanism of control over [Paula], as was [Mother's] breast feeding of [Paula] until a late age, the self-diagnosis of numerous false allergies, the refusal to immunize her, the refusal to allow her to attend school, the refusal to obtain a birth certificate or social security number, and the refusal to let her use her real name in public. Not only did these things all exhibit control, but they also demonstrated in Dr. Wilson's words, a disturbing level of "paranoia" and "narcissism" by [Mother]. Dr. Wilson was particularly concerned from a medical standpoint that [Mother] had withheld all medical care and immunizations from [Paula] for no justifiable reason for 5 ½ years. [Paula] had even been born at home with no prenatal care from any medical doctor. Dr. Wilson opined that this was all unnecessary, dangerous behavior in regard to [Paula]. . . .

34. It is obvious to the [trial court] that [Mother's] plan to conceal [Paula] from [Father] for 5 ½ years included the taking of unwarranted and even life-threatening health risks for [Paula]. It is equally obvious to the [trial court] that [Mother] is still in denial about her responsibility for hiding and concealing [Paula] from [Father] for 5 ½ years. . . .

34. The [trial court] further believes that [Paula] would benefit from some additional counseling to deal with the anger issues which she has experienced

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. . . . Any counselor selected by [Father] for such purpose should be provided copies of all testing, notes, reports and other information which is produced by [Mother's] psychiatrist. The counselor is not required to do so but may also do counseling sessions with [Mother] if and when it is deemed necessary or advisable by the counselor.

. . . .

36. [Mother's] continued violations of rules of the supervising agencies, Our House and SonShine Child Care, *shows the [trial court] that she will not follow the orders of [the trial court]*.

(Emphasis added).

¶ 43 “[I]t is well established by this Court that where a trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *Cushman v. Cushman*, 244 N.C. App. 555, 558, 781 S.E.2d 499, 502 (2016). Mother has not challenged any of the above-mentioned findings of fact, and they are therefore binding on us.

¶ 44 These unchallenged findings of fact and the challenged findings of fact supported by substantial evidence demonstrate Mother’s behaviors have been more harmful than beneficial to Paula and many of Mother’s actions will have life-long mental, physical, and emotional consequences for Paula. Further, Mother remains a flight risk and refuses to comply with the rules of the visitation agencies. Most importantly, Mother has shown and the trial court explicitly found, in Finding of Fact 36, that *she will not follow court orders*. We emphasize the importance of this unchallenged and binding finding regarding a party’s unwillingness to comply with court orders.

¶ 45 While Mother argues “the trial court’s concerns regarding the possibility that [Mother] would flee with [Paula] are adequately addressed by limiting visitation to supervised visitation within the home county[,]” she fails to acknowledge the fact that Mother continues to disobey the rules of the supervising agencies and has continually caused disruptions during visitations with Paula. Moreover, unchallenged Finding of Fact 30 states, in part, “[Mother’s] actions suggest to the [trial court] that she was attempting to get the police or DSS to place [Paula] in her custody that day on [31 July 2018]” when Mother brought an off-duty police officer to the visitation center and caused a disruption. Mother has also

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historically disobeyed and circumvented orders of the courts. The trial court's determination that limiting visitation to supervised visitation within the home county was not feasible is supported by the Record.

¶ 46 Considering the evidence and findings that Mother has already demonstrated a proclivity and ability to readily avoid court orders, arrest warrants, and hearings during the five-and-a-half years she had Paula in her custody, has contemplated killing Father, has had access to a gun, and has had homicidal and suicidal thoughts regarding Paula and herself, Findings of Fact 6 and 39 and Conclusion of Law 4 are supported by the findings of fact in the Record. "It is not in [Paula's] best welfare and interests that [Mother] exercise any visitation."

CONCLUSION

¶ 47 The trial court did not err when it denied visitation between Paula and Mother. Substantial evidence and unchallenged findings of fact support the findings of fact challenged by Mother, and the findings of fact support the trial court's conclusion of law that it is not in Paula's best interest to have visitation with Mother.

AFFIRMED.

Judges INMAN and WOOD concur.

LAUREN OSBORNE, BY AND THROUGH HER GUARDIAN, MICHELLE ANN POWELL AND
MICHELLE ANN POWELL, PLAINTIFFS

v.

YADKIN VALLEY ECONOMIC DEVELOPMENT DISTRICT, INCORPORATED; STOKES
COUNTY BOARD OF EDUCATION; STOKES COUNTY SCHOOLS; SONYA M. COX;
PATRICIA M. MESSICK; REBECCA BOLES; WILLIAM HART; JAMIE YONTZ; BRAD
LANKFORD; RONNIE MENDENHALL; JEFF COCKERHAM; DEFENDANTS

No. COA20-485

Filed 7 September 2021

1. Civil Rights—42 U.S.C. § 1983—equal protection—sexual assault of student by bus driver—sufficiency of allegations

Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their equal protection claim (pursuant to 42 U.S.C. § 1983) against the school board where there were no factual allegations

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that the student was treated differently on the basis of her gender and where the student's disability did not afford her special protection under the Equal Protection Clause.

2. Civil Rights—42 U.S.C. § 1983—substantive due process—sexual assault of student by bus driver—sufficiency of allegations

Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their substantive due process claim (pursuant to 42 U.S.C. § 1983) that the school board deprived the student of bodily integrity where there were no factual allegations that the board intentionally acted to increase the risk of danger to the student.

3. Civil Rights—42 U.S.C. § 1983—sexual assault of student by bus driver—failure to train and supervise

Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their equal protection claim (pursuant to 42 U.S.C. § 1983) that the school board failed to properly train and supervise the bus driver who committed the assaults. There were no factual allegations that there were similar prior incidents, that the board showed a deliberate indifference that led to the assaults, or that the board had actual or constructive knowledge that the bus driver posed a risk to the student.

4. Negligence—duty of care—transport of special-needs student—statutory authority to delegate—independent contractor rule

A school board was not liable for the actions of a bus driver who sexually assaulted a special-needs student where the board properly delegated its duty to safely transport the student pursuant to N.C.G.S. § 115C-253 to a non-profit transportation service, which operated as an independent contractor because the Board did not retain the right to exercise control over its performance of the contract.

5. Civil Rights—Title IX claim—sexual assault of female student by bus driver—no actual knowledge by school board

There was no genuine issue of material fact regarding the Title IX discrimination claim brought against a school board by the parents of a special-needs student who was sexually assaulted by her bus driver—who worked for the independent contractor hired by the

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school board—where no school board member or school employee had any actual knowledge that the student had been assaulted until after the bus driver was arrested and fired.

Judge DIETZ concurring by separate opinion.

Judge ARROWOOD concurring by separate opinion.

Appeal by Plaintiffs from orders entered 26 August 2019 by Judge Stanley L. Allen and 18 February 2020 by Judge Eric C. Morgan in Stokes County Superior Court. Heard in the Court of Appeals 26 January 2021.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by W. Kirk Sanders and Joshua P. Dearman, for Plaintiffs-Appellants.

Tharrington Smith, LLP, by Deborah R. Stagner, for Stokes County Board of Education, Defendant-Appellee.

WOOD, Judge.

¶ 1 Lauren Osborne (“Lauren”) and Michelle Ann Powell (“Ms. Powell”), Lauren’s mother, (collectively, “Plaintiffs”) appeal from an order granting summary judgment regarding Plaintiffs’ negligence claim and Title IX of the Education Amendments of 1972 (“Title IX”) claim in favor of the Stokes County Board of Education (the “Board”), and an order dismissing Plaintiffs’ claims under 42 U.S.C. § 1983 *et seq.* (“Section 1983”). After careful review of the record and applicable law, we affirm the order of the trial court.

I. Background

¶ 2 Lauren was a twenty-year-old special-needs student who attended West Stokes High School. Lauren is severely disabled with an IQ of forty-one and the functional capacity of a first-grade student. Testimony from Lauren’s teacher, nurse, assistant, principal, yellow bus driver, and the superintendent demonstrates Lauren was vulnerable, immature, and susceptible to exploitation. In addition to her mental disability, Lauren suffers from severe diabetes. Her condition requires her to have an insulin pump, emergency medical plan, and monitoring by adults throughout the day as she has needed transportation to the hospital for medical care on several occasions. Lauren also required constant adult supervision at school to prevent bullying by other students.

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¶ 3 Every special-needs student has their own Individualized Education Plan (“IEP”) prepared by an IEP team that outlines that student’s learning plan. Jane Wettach, *Parents’ Guide to Special Education in North Carolina* 12 (2017). https://law.duke.edu/childedlaw/docs/Parents%27_guide.pdf. The Board oversees and administers public schools in Stokes County, North Carolina. Entities, like the Board, are required to give parents advance notice of a student’s annual IEP development meeting. The Board is also required to encourage parents to participate in the development of their student’s learning plans. Throughout her enrollment in Stokes County Schools (“SCS”), Lauren had an IEP, and she received transportation to her assigned school as a “related service” to her IEP, under the federal Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* Prior to November 2013, Lauren rode to West Stokes High School on a yellow school bus owned by SCS. Lauren’s bus exclusively transported special-needs students and had an assigned bus monitor¹ because other students on the bus required a monitor as part of their IEPs. This bus was known as an exceptional children’s (“EC”) bus.

¶ 4 In 2013, many special-needs students in Stokes County were assigned to specialized classes offered at schools other than their district-ed schools, and their bus rides could be exceptionally long. To address the long bus rides for students and to promote the efficiency of its bus fleet, SCS Transportation Director Brad Lankford (“Mr. Lankford”) recommended that the Board explore using contracted transportation for exceptional students. Mr. Lankford investigated the cost of contracting transportation services. In August 2013, the Board contracted with Yadkin Valley Economic Development District, Inc. (“YVEDDI”) to provide transportation for some of the special-needs students enrolled in SCS.

¶ 5 YVEDDI is a non-profit corporation that has provided transportation services for several neighboring school districts for decades. YVEDDI also provides transportation services for Head Start² and sheltered workshop programs for adults with disabilities. Before recommending that YVEDDI provide transportation services for SCS students, Mr. Lankford talked to transportation directors in surrounding counties to get references and an idea of the cost and type of services

1. A bus monitor rides a school bus on assigned route(s) and schedule(s) to provide safe and efficient transportation so that a student may enjoy the fullest possible advantage from the programs and offerings of the school system. We use “bus monitor” and “safety monitor” interchangeably throughout.

2. Head Start is a federally funded, comprehensive program designed to promote the readiness of infants, toddlers, and preschool-aged children from low-income families through a variety of special services.

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YVEDDI provided. Mr. Lankford also requested qualification and safety information from YVEDDI's transportation director, Jeff Cockerham ("Mr. Cockerham"). YVEDDI had a safety plan in place which included driver hiring procedures and qualifications, drug testing, vehicle maintenance, and security. Before the Board entered into its initial contract with YVEDDI, Mr. Cockerham provided to Mr. Lankford the following: YVEDDI's safety plan; minimum qualifications for YVEDDI drivers; training program for YVEDDI drivers; YVEDDI's drug and alcohol compliance documentation; preventative maintenance schedule; and certificate of liability insurance. YVEDDI offered to quote its bid with safety monitors on board the vehicles, but the Board declined to have YVEDDI include safety monitors in the bid. The State does not reimburse school systems for safety monitors.

¶ 6 The Board's contract with YVEDDI required the transportation company to comply with its approved safety plan, provide a well-trained driver, conduct pre-employment criminal background checks and drug testing of drivers, and to conduct random drug testing according to North Carolina Department of Transportation ("NCDOT") regulations. YVEDDI began transporting some SCS special-needs students to and from school in August 2013, at the start of the 2013-2014 school year. The Board entered into subsequent contracts with YVEDDI to transport special-needs students to and from school in the 2014-2015 and 2015-2016 school years. The YVEDDI vans that transported SCS students were equipped with safety equipment including first aid kits, NCDOT-mandated video cameras, and "push to talk phones."

¶ 7 Lauren was accustomed to riding a yellow school bus with other special-needs students and a safety monitor for transportation to West Stokes High School. Starting in November 2013, the Board changed Lauren's transportation from an exceptional students school bus with a safety monitor to a YVEDDI van that did not have a safety monitor. The school notified Lauren's mother of the change to Lauren's transportation service only after the arrangements were made. According to Mr. Lankford's deposition testimony, Lauren's change from an exceptional students school bus with a safety monitor to a YVEDDI van without one required an IEP team meeting. Additionally, Lauren's teacher testified that transportation was not discussed in Lauren's annual IEP meeting, and furthermore, had it been discussed during the meeting, he would have recommended a safety monitor for his special-needs students like Lauren.

¶ 8 During the 2014-2015 and 2015-2016 school years, Lauren was transported in a YVEDDI van driven by Robert King ("King"), a YVEDDI employee. King held a valid North Carolina driver's license that met

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YVEDDI's license requirements. King completed YVEDDI's application, screening, and driver training required under YVEDDI's safety plan. King had no prior criminal record and received both pre-employment and quarterly criminal background checks. King was drug tested and received forty hours of classroom and on-the-job driver training that met NCDOT standards. King was trained on interacting with disabled passengers; sensitivity and sexual harassment; defensive driving; blood-borne pathogens; and first aid and CPR. King was also informed he was not supposed to touch the students he was transporting.

¶ 9 On two separate days in December 2015, while transporting Lauren and other students, King stopped the YVEDDI van multiple times and sexually assaulted Lauren. The YVEDDI van was equipped with video cameras, and video evidence reveals King sexually assaulted Lauren twenty-one times by groping and digitally penetrating her. Though Lauren was twenty years old, she only had the functional capacity of a first-grade student and lacked the capability to comprehend and consent to the sexual acts committed against her. Specifically, Lauren lacked the communication skills to tell Ms. Powell why she suffered from anal bleeding resulting from the sexual assaults.

¶ 10 A Stokes County resident was concerned about the operation of the van and reported King's driving to YVEDDI, which prompted the company to review the video footage on Lauren's van. YVEDDI discovered King's inappropriate actions against Lauren and immediately reported King's actions to law enforcement and terminated his contract. YVEDDI did not notify the Board of the assaults, King's arrest, or King's termination. School officials first learned about the sexual assaults from Lauren's mother, Ms. Powell, after she was contacted by law enforcement following King's arrest. When the Board's superintendent, assistant superintendent, Exceptional Childrens director, transportation director, and the West Stokes High School principal all learned of the sexual assaults, they did not investigate for other potential sexual assaults against students, draft a report on Lauren's sexual abuse, or offer post-abuse counseling. The Board's policies require all verified sexual assault cases to be investigated and reported to the State Board of Education. The Board also requires written documentation of all reports of sexual assaults and requires the school system's responses to be maintained. The Board did not report Lauren's sexual assaults to the State Board of Education as required by its standard procedure, nor did it offer an explanation as to why it did not follow its standard procedure.

¶ 11 On December 4, 2018, Plaintiffs filed a complaint against the Board, the Board's individual school board members and staff, YVEDDI, Mr.

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Cockerham, and SCS. Plaintiffs asserted claims for negligence; negligence *per se*; negligent infliction of emotional distress; Section 1983 discrimination; Title IX damages; and negligent supervision, retention, and common carrier stemming from the multiple sexual assaults by the van driver.

¶ 12 On March 6, 2019, the Board filed its answer and motion to dismiss Plaintiffs' Section 1983 and Title IX claims. On August 26, 2019, the trial court granted the Board's motion in part, dismissing all of Plaintiffs' Section 1983 claims and Plaintiffs' Title IX claims with respect to the individual school board members and staff. The Title IX claims against the Board, however, remained intact. On August 22, 2019, Plaintiffs voluntarily dismissed their claims against YVEDDI and Mr. Cockerham.

¶ 13 On November 13, 2019, Plaintiffs moved for partial summary judgment on liability and causation of damages regarding Plaintiffs' negligence *per se* claim. The Board moved for summary judgment as to Plaintiffs' remaining Title IX; negligence; negligence *per se*; and negligent supervision, retention and common carrier claims on November 14, 2019. On February 18, 2020, the trial court denied Plaintiffs' motion for partial summary judgment and granted the Board's motion for summary judgment on Plaintiffs' negligence *per se*; negligence; negligent infliction of emotional distress; Title IX; and negligent hiring, training, retention, and supervision claims. On March 2, 2020, Plaintiffs filed a notice of appeal.

II. Discussion

¶ 14 Plaintiffs raise several arguments on appeal. Each will be addressed in turn.

A. The Board's Motion to Dismiss

¶ 15 Plaintiffs contend the trial court erred in granting the Board's motion to dismiss Plaintiffs' claims under Section 1983. Plaintiffs' claims arise from alleged violations of Lauren's constitutional rights to equal protection and substantive due process. Plaintiffs asserted an additional Section 1983 claim alleging failure to train and supervise. Specifically, Plaintiffs argue the trial court erred in dismissing their Section 1983 claims because their complaint "stated sufficient factual allegations" to state a claim pursuant to N.C. R. Civ. P. 12(b)(6). We disagree.

¶ 16 In reviewing an order granting a motion to dismiss, "we review the pleadings *de novo* to determine their legal sufficiency and . . . whether the trial court's ruling was proper." *Radcliffe v. Avenel Homeowners Ass'n, Inc.*, 248 N.C. App. 541, 552, 789 S.E.2d 893, 902 (2016) (citation

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omitted). “A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint.” *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). “North Carolina is a notice pleading state.” *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation omitted). “While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6).” *Raritan River Steel Co.*, 322 N.C. at 205, 367 S.E.2d at 612.

¶ 17 “When the complaint on its face reveals the absence of fact sufficient to make a good claim, dismissal of the claim pursuant to Rule 12(b)(6) is properly granted.” *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 57, 554 S.E.2d 840, 845 (2001) (internal quotations marks, citation, and alterations omitted). “On a motion to dismiss, the complaint’s material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity.” *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014) (citation omitted). Dismissal is appropriate when “(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.” *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

1. Equal Protection

¶ 18 [1] Plaintiffs allege the Board violated Lauren’s constitutional right to equal protection. The Equal Protection Clause of the Fourteenth Amendment (the “Equal Protection Clause”) to the United States Constitution (the “Constitution”) provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. To state an equal protection claim, a plaintiff must plead sufficient facts to “demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.” *Williams v. Hansen*, 326 F.3d 569, 576 (4th Cir. 2003) (citation and quotation marks omitted), *cert. denied*, 540 U.S. 1089, 124 S. Ct. 958, 157 L. Ed. 2d 794 (2003); *see also Gilbreath v. Cumberland Cnty. Bd. of Educ.*, No. COA16-927, 2017 N.C. App. LEXIS 307, at *16-17 (N.C. Ct. App. April 18, 2017). The second element of an equal protection claim requires factual allegations sufficient to show that any unequal treatment was done intentionally or purposefully to discriminate against the plaintiff. *Good Hope Hosp., Inc. v. N.C. Dept. of Health and Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005)).

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¶ 19 Here, the complaint alleges that “Lauren, as a female, is a member of a protected class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.” However, because the complaint is devoid of any factual allegations sufficient to establish that Lauren was treated differently from similarly situated male students, it fails to state the first element of an equal protection violation based on Lauren’s gender. *See Hanton v. Gilbert*, 842 F. Supp. 845, 854 (M.D.N.C.), *aff’d*, 36 F.3d 4 (4th Cir. 1994) (“Plaintiff must show that she was treated differently from other similarly situated individuals and that but for her sex she would not have been so treated.”); *see also Gilreath*, 2017 N.C. App. LEXIS 307, at *16-17.

¶ 20 Plaintiffs also allege in the complaint that Lauren was denied equal protection on the basis of her disability, because she was isolated and segregated from the general student population in transportation. However, the Supreme Court has held that the disabled are not a suspect or quasi-suspect class entitled to special protection under the Equal Protection Clause. *See Brown v. N.C. Dep’t of Motor Vehicles*, 166 F.3d 698, 706 (4th Cir. 1999); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46, 105 S. Ct. 3249, 3257-58, 87 L. Ed. 2d 313, 324 (1985).

¶ 21 Therefore, we conclude Plaintiffs’ claim under Section 1983 for violation of the Equal Protection Clause was properly dismissed under Rule 12(b)(6).

2. Substantive Due Process

¶ 22 [2] Plaintiffs also allege the Board deprived Lauren of her right to substantive due process. “Section 1983 imposes liability on state actors who cause the deprivation of any rights, privileges, or immunities secured by the Constitution. Under established precedent, these constitutional rights include a Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity.” *Doe v. Durham Pub. Sch. Bd. of Educ.*, No. 1:17-CV-773, 2019 WL 331143, at *8 (M.D.N.C. Jan. 25, 2019); *see also Farrell v. Transylvania Cnty. Bd. of Educ.*, 199 N.C. App. 173, 180, 682 S.E.2d 224, 230 (2009) (recognizing the “right to ultimate bodily security . . . is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process” (citation omitted)). Sexual molestation of a student by a state actor may be a constitutional injury for purposes of Section 1983. *Durham Pub. Sch. Bd. of Educ.*, 2019 WL 331143 at * 8 (citations omitted). However, “a state’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” *Stevenson ex*

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rel. Stevenson v. Martin Cnty. Bd. of Educ., 3 Fed. App'x 25, 32 (4th Cir. 2001) (citing *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198, 109 S. Ct. 998, 1004, 103 L. Ed. 2d 249, 260 (1989)).

¶ 23 Here, Plaintiffs allege the Board “created a dangerous environment for Lauren” by contracting with YVEDDI to transport disabled students, failing to require YVEDDI to have a monitor on the bus, and by not verifying that YVEDDI was monitoring the video camera. However, “to establish [Section] 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through *affirmative acts*, not merely through inaction or omission.” *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015) (emphasis added); *see also DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006, 103 L. Ed. 2d at 262-63 (observing that “[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them Under th[o]se circumstances, the State had no constitutional duty to protect [the child.]”). Plaintiffs’ complaint does not contain factual allegations that would establish conduct by the Board that was so intentional or affirmative that it shocks the conscience.

¶ 24 Thus, we conclude Plaintiffs’ claim under Section 1983 for violation of substantive due process was properly dismissed under Rule 12(b)(6).

3. Failure to Train and Supervise

¶ 25 [3] Plaintiffs also allege the Board failed to properly train and supervise its employees, including YVEDDI and King, which led to violations of Lauren’s constitutional rights to equal protection. As a preliminary matter, we note our courts have not yet decided a failure to train claim arising under Section 1983. Therefore, we look to decisions of federal jurisdictions for persuasive guidance.

A municipality’s failure to train its officials can result in liability under [S]ection 1983 only when such failure reflects a deliberate indifference to the rights of its citizens and the identified deficiency in a city’s training program [is] closely related to the ultimate injury. Additionally, a plaintiff must show a direct causal link between a specific deficiency in training and the particular violation alleged.

Hill v. Robeson Cnty., N.C., 733 F. Supp. 2d 676, 686-87 (E.D.N.C. 2010) (internal citations and quotation marks omitted). However, “[a]

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municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417, 426-27 (2011). "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. . . . A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 61-62 (internal quotation marks omitted). The deficiency in training must also "make the occurrence of the specific violation a 'reasonable probability rather than a mere possibility.'" *Hatley v. Bowden*, No. 5:13-CV-765-FL, 2014 WL 860538, at *3-4 (E.D.N.C. Mar. 5, 2014) (quoting *Semple v. City of Moundsville*, 195 F.3d 708, 713 (4th Cir. 1999)).

¶ 26 Here, Plaintiffs fail to allege sufficient factual allegations to support a liability claim under Section 1983 for failure to train the Board, school officials, YVEDDI, and King. Plaintiffs do not allege there were prior incidents of this kind, nor are there any factual allegations showing that the Board or school officials demonstrated a deliberate indifference that was likely to lead to a contracted bus driver's sexual abuse of a student. The failure to train municipal personnel may rise to the level of an unconstitutional custom or policy, where there is a history of widespread abuse. *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412, 426-27 (1989); see also *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983). Plaintiffs further fail to identify any specific deficiency in training that led to a violation of Lauren's constitutional rights. Instead, the complaint contains general contentions that the Board failed to provide training or supervision regarding the duty to "[m]onitor, perceive, and stop sexual assault and abuse." However, allegations of mere negligence with regard to training are insufficient to state a claim for municipal liability. See *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987)); see also *City of Canton*, 489 U.S. at 389, 109 S. Ct. at 1205, 103 L. Ed. 2d at 427 (finding that mere allegations regarding a city policy or custom cannot confer municipal liability for failure to train (citations omitted)).

¶ 27 Plaintiffs also asserted Section 1983 liability based on a failure to supervise.

[T]o establish supervisory liability under [Section] 1983[, a plaintiff must show]: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury

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to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,'; and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

See Farrell, 199 N.C. App. at 181, 682 S.E.2d at 230 (quoting *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.), *cert. denied*, 513 U.S. 813, 115 S. Ct. 67, 130 L. Ed. 2d 24 (1994)). Likewise, "a supervisor's failure to train his employees can subject him to liability where the failure to train reflects a 'deliberate indifference' to the rights of citizens." *Durham Cnty. Bd. of Educ.*, 2019 WL 331143, at *8 (quoting *Layman v. Alexander*, 294 F. Supp. 2d 784, 793 (W.D.N.C. 2003)); *see also City of Canton*, 489 U.S. at 389, 109 S. Ct. at 1204, 103 L. Ed. 2d at 429 (holding that respondent's civil rights claim was cognizable only if petitioner's failure to train its police force "reflect[ed] a deliberate indifference to the constitutional rights of its inhabitants").

¶ 28 Here, King is the only individual Plaintiffs allege to have abused Lauren. King was not a subordinate of the Board. No school employee is alleged to have committed acts upon Lauren that violated her substantive due process rights to bodily integrity and to be free from sexual abuse. Thus, a claim that the Board failed to properly train or supervise its employees or subordinates fails.

¶ 29 Plaintiffs do not allege facts of supervisory liability sufficient to survive a motion to dismiss. All factual allegations in the complaint regarding the Board's alleged supervisory liability consist of contentions that it failed to ensure YVEDDI properly trained and supervised its employees. Such allegations simply do not support a plausible conclusion that the Board had actual or constructive knowledge that King was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to Lauren. Therefore, the trial court properly dismissed Plaintiffs' Section 1983 claims against the Board for failure to train and supervise.

B. The Board's Motion for Summary Judgment

¶ 30 Next, Plaintiffs allege the trial court erred in granting Defendant's motion for summary judgment with respect to Plaintiffs' negligence and Title IX claims.

¶ 31 This Court reviews an appeal from a summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

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“Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.” *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

¶ 32 Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. 1A-1, Rule 56(c) (2020). “If a genuine issue of material fact exists, a motion for summary judgment should be denied.” *Park East Sales, LLC v. Clark-Langley, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004)).

¶ 33 To survive a motion for summary judgment in a negligence case, the plaintiff must establish a *prima facie* case of negligence. Specifically, Plaintiffs must show “(1) [the Board] owed the plaintiff a duty of reasonable care, (2) [the Board] breached that duty, (3) [the Board’s] breach was an actual and proximate cause of the plaintiff’s injury, and (4) the plaintiff suffered damages as the result of [the Board’s] breach.” *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009) (quoting *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994) (citations omitted)). “[T]he question of foreseeability is one for the jury.” *Carsonaro v. Colvin*, 215 N.C. App. 455, 459, 716 S.E.2d 40, 45 (2011) (quoting *Fussell v. NC Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010)). Summary judgment is rarely granted in negligence cases. *King v. Allred*, 309 N.C. 113, 115, 305 S.E.2d 554, 556 (1983).

¶ 34 “The party moving for summary judgment has the burden of establishing the lack of any triable issue,” and “[a]ll inferences of fact from the proofs offered at the hearing must be drawn . . . in favor of the party opposing the motion.” *Monzingo v. Pitt County Memorial Hosp. Inc.*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992) (citations omitted). The Board has the burden to prove Plaintiffs failed to demonstrate the essential elements of negligence. *See id.* (citations omitted).

1. The Board’s Negligence

¶ 35 [4] Plaintiffs contend the trial court erred in granting the Board’s motion for summary judgment with respect to Plaintiffs’ negligence claim. Plaintiffs argue genuine issues of material fact exist regarding (1) the duty of care the Board owed to Lauren and (2) the foreseeability of the harm Lauren suffered. While we sympathize with Plaintiffs for the

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irreparable harm Lauren suffered, we must find the trial court properly granted summary judgment under our current tort law.

¶ 36

First, the parties dispute whether the Board should be held to a heightened standard of care when making transportation decisions for special-needs students. Plaintiffs contend the Board had a heightened duty of care to ensure Lauren's safety from the dangerous actions of others because she was a member of a vulnerable population. In cases where the student in question is a member of a vulnerable population, particularly one who possesses an IQ far below the average for her age, we reiterate that the State owes a duty of care "relative to the [victim]'s maturity." *Nowlin v. Moravian Church in Am.*, 228 N.C. App. 307, 311, 745 S.E.2d 51, 54 (2013). In *Nowlin*, this Court held "foreseeability of harm to the [victim] is the relevant test which defines the extent of the duty to safeguard [victims] from the dangerous acts of others." *Nowlin*, 228 N.C. App. at 311, 745 S.E.2d at 54. Under a pure "foreseeability of harm test," we recognize a jury could reasonably conclude the Board owed students such as Lauren a heightened duty of care. *See id.*; *see also Carsonaro*, 215 N.C. App. at 459, 716 S.E.2d at 45 (citing *Fussell*, 364 N.C. at 226, 695 S.E.2d at 440) (holding foreseeability is generally a question to be decided by the jury). While we agree with Plaintiffs that the Board was required to exercise a heightened duty of care while making decisions regarding its special needs pupils, we find the trial court properly granted summary judgment under our current tort law.

¶ 37

Plaintiffs rely on *Slade v. New Hanover Cnty. Bd. of Educ.*, 10 N.C. App. 287, 291, 178 S.E.2d 316, 318 (1971), in which this Court recognized that certain school employees, such as a bus driver, have a duty to exercise a high degree of caution in fulfilling their employment obligations. 10 N.C. App. at 291, 178 S.E.2d at 318 (citing *Greene v. Board of Education*, 237 N.C. 336, 340, 75 S.E.2d 129, 131 (1953)). This Court noted that a bus driver is responsible for the safety of children of different ages and levels of maturity so that "it is his duty to see that those who do alight [from the bus] are in places of safety" and looked after with care "proportionate to the degree of danger inherent in the passenger's youth and inexperience." *Id.* at 291, 295, 178 S.E.2d at 318, 321. We emphasize the standard recognized in *Slade* and reiterate that certain school employees have a duty to exercise a high degree of caution in fulfilling their responsibilities. However, a fundamental principle of our current tort law defeats Plaintiffs' claim in this case. Generally, "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991). The only exception to this rule

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is certain non-delegable duties, such as work involving ultrahazardous or inherently dangerous activity. *Id.*

¶ 38 Here, the Board delegated its duty to safely transport Stokes County students pursuant to N.C. Gen. Stat. § 115C-253, which provides “[a]ny local board of education may . . . enter into a contract with any person, firm or corporation for the transportation . . . of pupils enrolled in the public schools.” N.C. Gen. Stat. § 115C-253 (2020). Plaintiffs essentially argue the Board should be held liable in tort law despite the Board’s statutory authority to delegate the transportation of its students. However, this theory of liability ignores our current independent contractor rules. There is no evidence in the record to suggest the Board retained the right to control the manner in which YVEDDI would transport students such as Lauren. YVEDDI hired and controlled the drivers, owned its own vehicles, determined its routes, and set its own policies. The Board researched and reviewed YVEDDI’s reputation, safety plans, and, after contracting, provided names and addresses of students to be transported, along with bell times. Therefore, the Board did not exercise the degree of control over YVEDDI necessary to convert YVEDDI from an independent contractor to an employee.

¶ 39 Nor is there any evidence to suggest that transporting students is an ultrahazardous or inherently dangerous activity. Moreover, the statute authorizing school districts to contract for student transportation expressly indicates that this is a delegable duty. *See* N.C. Gen. Stat. § 115C-253. As this Court has previously recognized, “the administration of the public schools of the state is best left to the legislative and executive branches of government.” *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997). “[T]he courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education.” *Id.* Therefore, while we agree that the Board should exercise the utmost standard of care while making decisions regarding its students, we are obliged to find the Board could properly delegate any duty owed to Lauren to an independent contractor such as YVEDDI under our current law. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” (citations omitted)).

¶ 40 Although no North Carolina court has considered whether the duty to transport students safely is delegable on these facts, other jurisdic-

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tions have expressly declined to extend tort liability in circumstances where the harm occurred when the student was not in the school's physical custody. In *Chainani v. Bd. of Educ. of City of New York*, 663 N.E.2d 283, 286 (N.Y. 1995), New York's high court rejected the argument that safe transportation of students was non-delegable and held that "the schools had contracted-out responsibility for transportation, and therefore cannot be held liable on a theory that the children were in their physical custody at the time of injury." The court noted that the legislature authorized schools to contract with third parties for student transportation; thus, the school districts were "relying reasonably on the company to act responsibly in protecting the safety of the children it was charged to transport." *Id.* Similarly, in *Dixon v. Whitfield*, 654 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1995), the court observed that, given the statutes and regulations authorizing contractors to transport public school students, "the parties cite no controlling Florida authority, and we could find none in our own research, for the proposition that the safe transportation of public school students is a nondelegable duty." *Id.* The same is true in North Carolina. Absent guidance from our Supreme Court or our legislature, we must hold the Board is not an "insurer of student safety," see *Payne v. N. Carolina Dep't of Human Res.*, 95 N.C. App. 309, 313, 382 S.E.2d 449, 451 (1989), but delegated any duty it owed to Lauren pursuant to the statutory authority found in N.C. Gen. Stat. § 115C-253. In our discretion, we address the foreseeability of Lauren's injury.

¶ 41 While we are bound by our precedent and affirm the order of the trial court, we recognize there is no genuine dispute as to the foreseeability of Lauren's injury. Here, Lauren was a twenty-year-old special-needs student with an IQ of forty-one and severe diabetes. Testimony from Lauren's teacher, nurse, assistant, principal, yellow bus driver, and the superintendent demonstrates Lauren was vulnerable, immature, and susceptible to exploitation. Lauren had the functional capacity of a first-grade student and lacked the capability to comprehend and consent to the sexual acts committed against her. In addition to her mental disabilities, Lauren's diabetes and related medical care required constant adult supervision during the school day. On several occasions, while enrolled in SCS, Lauren had to go to the hospital directly from her school for medical care. It is undisputed that Lauren's intellectual disabilities and medical fragility render her highly susceptible to exploitation and harm without proper monitoring and support.

¶ 42 The Special Education environment is full of specialized customs and practices designed to provide the particular care, supervision, and protections needed to enable each individual student access to an appropriate education. Where there is an existing custom or practice in

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place utilized to protect a special-needs student, it stands to reason a harm could be more likely in the absence of such a custom. *See Briggs v. Morgan*, 70 N.C. App. 57, 61, 318 S.E.2d 878, 881-82 (1984) (A customary practice “is normally relevant and admissible as an indication of what the community regards as proper” to address the risks of a particular individual. (citation omitted)). Because the Board’s customary practice had been to provide transportation for Lauren on an exceptional students school bus staffed with a safety monitor, we emphasize that Lauren’s injury was one that could have been prevented.

¶ 43 Absent guidance by our legislature, we are obliged to hold the trial court did not err in granting summary judgment. To hold otherwise would be to ignore the independent contractor rule, that states when an employer properly delegates a duty pursuant to a statutory authority, its duty ceases. Because we are bound by our precedent, we hold the trial court did not err in granting summary judgment.

2. Title IX.

¶ 44 [5] Plaintiffs further contend that the trial court erred in granting the Board’s motion for summary judgment on the Board’s alleged violation of Title IX. We disagree.

¶ 45 As discussed *supra*, this Court reviews an appeal from a summary judgment order *de novo*. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385. Pursuant to Rule 56 of our rules of civil procedure, summary judgment is appropriate where there is no genuine dispute of material fact. N.C. Gen. Stat. § 1A-1, Rule 56. Generally, the moving party “has the burden of demonstrating a lack of triable issues.” *Monzingo*, 331 N.C. at 187, 415 S.E.2d at 344. In reviewing a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. *Id.*

¶ 46 Title IX prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. *See* 20 U.S.C. § 1681 *et seq.* Sexual harassment and abuse of a student can constitute discrimination “on the basis of sex” under Title IX. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75, 112 S. Ct. 1028, 1037, 117 L. Ed. 2d 208, 223 (1992). However, an institution such as the Board can be held liable for a Title IX violation if “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination in the [institution]’s programs and fails adequately to respond. . . . [It] amount[s] to deliberate indifference to discrimination.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 1999, 141 L. Ed. 2d 277, 292 (1998).

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¶ 47 The 11th Circuit Court of Appeals (“11th Circuit”) found that “[t]o survive a summary judgment motion, a Title IX plaintiff must present evidence from which a reasonable jury could conclude the Title IX recipient’s deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination.” *Hill v. Cundiff*, 797 F.3d 948, 973 (11th Cir. 2015) (internal quotation marks omitted). “The deliberate indifference standard is rigorous and hard to meet.” *Id.* at 975. We find the 11th Circuit’s reasoning compelling and apply its rationale in this instance.

¶ 48 In this case, Plaintiffs’ Title IX claim fails because no school employee or Board member had actual knowledge of King’s sexual abuse of Lauren until after he had been arrested and terminated. The undisputed evidence shows school officials learned that King had abused Lauren only after the sheriff notified Ms. Powell, who in turn, contacted the school principal. In the absence of any evidence that a school official or Board member with authority to remedy alleged discrimination had actual knowledge of King’s abuse of Lauren, there is no genuine issue of material fact as to Plaintiffs’ Title IX claim against the Board. Therefore, we affirm the trial court’s grant of summary judgment in favor of the Board with respect to Plaintiffs’ Title IX claim.

III. Conclusion

¶ 49 We hold the trial court properly dismissed Plaintiffs’ claims under Section 1983 and granted summary judgment with respect to Plaintiffs’ Title IX claim. Under our current tort law, and, absent any guidance from our Supreme Court and legislature, we find the trial court did not err in granting summary judgment in favor of the Board on the issue of negligence pursuant to the independent contractor rule. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judge DIETZ concurs by separate opinion.

Judge ARROWOOD concurs by separate opinion.

DIETZ, Judge, concurring by separate opinion.

¶ 50 I concur in the majority’s judgment. I write separately to address two issues. First, I do not agree with the statements in the majority opinion and my concurring colleague’s opinion that “there is no genuine

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dispute as to the foreseeability of Lauren’s injury” and that “the injury in this case was certainly foreseeable.”

¶ 51 I am not prepared to hold that the felony sexual assault of a vulnerable special-needs student is always foreseeable to school officials as a matter of law. Criminal acts ordinarily are not foreseeable under tort law principles. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981). Had this claim reached a jury, the foreseeability of Lauren’s injury and issues of superseding and intervening causation would have been core disputed facts to be resolved by the jury. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 237–38, 311 S.E.2d 559, 567 (1984).

¶ 52 Second, I do not agree with my concurring colleague that there are “inconsistencies . . . in the protections that are afforded to our most vulnerable children depending on whether the school system provides the transportation or contracts with a third party.” The duty of care owed to Lauren and every other school student is the same whether their transportation is provided by the school itself or by a contractor who has taken on that duty. Whatever heightened level of protection the school district owed Lauren because of her special needs, the duty to provide that same level of protection passed to YVEDDI under the independent contractor rule.

ARROWOOD, Judge, concurring by separate opinion.

¶ 53 I concur in the majority opinion as being necessitated by law but write separately to express my concerns with the interaction between the statutory scheme and our caselaw. The statute authorizing delegation of the duty to transport public school students has effectively permitted boards of education to contract out of the heightened standard of care that this Court has previously held them to.

¶ 54 With respect to safeguarding public school students, this Court has held that the party charged with safeguarding our youth owes a duty of care “relative to the [victim]’s maturity[,]” specifically defining the extent of the duty required by the “foreseeability of harm to the [victim.]” *Nowlin v. Moravian Church in Am.*, 228 N.C. App. 307, 311 745 S.E.2d 51, 54 (2013) (holding that camp employees have a duty to exercise the same standard of care that a person of ordinary prudence, charged with the duty of supervising campers, would exercise under the same circumstances). Similarly, this Court held “[t]he care which a school bus driver must exercise toward a school bus passenger is proportionate to the

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degree of danger inherent in the passenger's youth and inexperience." *Slade v. New Hanover Cty. Bd. of Ed.*, 10 N.C. App. 287, 295, 178 S.E.2d 316, 321 (1971). Both standards reinforce the higher standard of care owed by the governmental authority to public school students under supervision, especially in situations where a student is more vulnerable.

¶ 55 Although this standard would apply here had the van driver been directly employed by the school system, the standard does not apply in the case *sub judice* for two reasons. First is N.C. Gen. Stat. § 115C-253 (2019), which allows any board of education to delegate their duty to transport public school students to "any person, firm or corporation[.]" The second is the well-established principle in our state's tort law that generally, "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991) (citation omitted). There is an exception to this rule only for certain non-delegable duties, including ultrahazardous or inherently dangerous activity. *Id.* In this case, because transporting students to school does not qualify as an ultrahazardous or inherently dangerous activity, the exception does not apply.

¶ 56 Taken together, *Woodson* and N.C. Gen. Stat. § 115C-253 effectively eliminate the Board of Education's duty to any public student unfortunate enough to find themselves in a vehicle operated by an independent contractor. Although this Court has held the governmental authority to a higher standard of care for bus drivers employed directly by the school district, the statute relieves them of their duty without any other apparent safeguards or higher standards with respect to who may be entrusted with the duty of transporting and supervising public school students. Absent further guidance from our General Assembly, it appears the standard of care owed by the governmental authority in these contexts depends entirely on how the driver is employed.

¶ 57 As the majority pointedly notes, the injury in this case was certainly foreseeable. Public school students, particularly vulnerable students like Lauren, are inherently at greater risk of injury and are accordingly owed a higher standard of care in these contexts. This duty is originally the Board of Education's to bear.

¶ 58 Given the interplay between *Woodson* and N.C. Gen. Stat. § 115C-235, I am compelled to concur in the result, but I write to point out the inconsistencies that this result creates in the protections that are afforded to our most vulnerable children depending on whether the school system

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provides the transportation or contracts with a third party. While I question whether this was the result that was intended when the statute was enacted, I see no avenue for relief from this conundrum absent legislative action or our Supreme Court's revisiting of the *Woodson* doctrine.

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CAROLINAS LLC, AND DUKE ENERGY PROGRESS, LLC, APPELLEES

v.

CUBE YADKIN GENERATION LLC, APPELLANT

No. COA20-46

Filed 7 September 2021

**Jurisdiction—public utility regulation—proposed business plan
—advisory opinion—no actual controversy**

Where the owner of hydroelectric generation facilities did not present a justiciable controversy when it sought a declaratory ruling from the North Carolina Utilities Commission that its proposed business plan—involving land it did not yet own and contracts it had not yet signed—fell within the landlord/tenant statutory exemption to public utility regulation, the Commission's decision stating that the owner would be subject to regulation as a public utility was vacated for being an advisory opinion.

Judge DIETZ concurring by separate opinion.

Judge JACKSON dissenting.

Appeal by Appellant from Order entered 4 September 2019 by Deputy Clerk A. Shonta Dunston in the North Carolina Utilities Commission. Heard in the Court of Appeals 29 April 2021.

The Allen Law Offices, by Dwight W. Allen, Britton H. Allen, and Brady W. Allen, and Lawrence B. Somers, Deputy General Counsel of Duke Energy Corporation, for the Appellees.

Brooks, Pierce, McLendon, Humphrey and Leonard, LLP, by Jim W. Phillips, Marcus W. Trathen, and Gisele Rankin, for the Appellant.

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Burns, Day & Presnell, P.A., by Daniel C. Higgins, for amici curiae North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1 and ElectricCities of North Carolina, Inc.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason, and Michael D. Youth, for amicus curiae North Carolina Electric Membership Corporation.

McGuireWoods LLP, by Brett Breitschwerdt and Tracy S. DeMarco, for amicus curiae Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina.

GRIFFIN, Judge.

¶ 1 Appellant Cube Yadkin Generation, LLC (“Cube”), appeals from an order of the North Carolina Utilities Commission (the “Commission”) declaring that Cube’s proposed business plan would cause it to be a public utility subject to regulation. Cube contends the Commission erred because its proposed plan falls within the landlord/tenant exemption to public utility regulation. After careful review, we hold that Cube has failed to present a justiciable controversy and vacate the Commission’s order.

I. Factual and Procedural Background

¶ 2 Cube is the owner and operator of four hydroelectric generation facilities located along the Yadkin River near Badin, North Carolina.¹ The Record shows that Cube currently operates as an exempt wholesale generator of electrical energy under a license issued by the Federal Energy Regulatory Commission. Exempt wholesale generators are not considered public-utility companies under federal law. *See* 15 U.S.C. § 79b (2021); 16 U.S.C. § 824 (2021); 18 C.F.R. § 366.1 (2021). Cube uses its hydroelectric generation facilities primarily to generate energy needed for its own internal operations and sells its entire surplus of electrical energy on the wholesale market.

¶ 3 In 2019, as part of an effort to explore additional or alternative uses for the electricity generated by its facilities,² Cube devised a plan to

1. Through an affiliate, Cube also owns transmission lines connecting its facilities to an electric substation located in a commercial area known as the Badin Business Park.

2. In a separate action before the Commission and this Court, Cube has also sought to sell the output of three of its four hydroelectric generation facilities to Duke Energy

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redevelop an area of land in Badin known as the Badin Business Park. The Badin Business Park is a commercial area. It served as the location for a large aluminum production plant for almost 100 years prior to the plant’s closure in 2007. Cube’s hydroelectric generation facilities were previously used to power the aluminum production facility. Two of Cube’s four facilities are located within the Badin Business Park. Cube intends to (1) purchase the Badin Business Park; (2) lease the land to prospective technology-based commercial tenants; and (3) supply electricity to those tenants by generating electricity from its own hydroelectric generation facilities located in or nearby Badin Business Park and/or by purchasing additional electricity as needed from the wholesale market (collectively, the “Proposed Plan”).

¶ 4 On 8 March 2019, Cube filed a Petition for Declaratory Ruling (the “Petition”) with the Commission requesting a declaration that Cube’s Proposed Plan qualified for exclusion from public utility regulation under the landlord/tenant exemption in N.C. Gen. Stat. § 62-3(23)(d). Prior to filing the Petition with the Commission, Cube also presented its Proposed Plan to the Public Staff of the Commission, who expressed their support. Appellees Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC (collectively, “Duke”), requested and were allowed to intervene in the Petition proceedings. The Commission also granted a number of other local electric utility monopoly providers the right to participate in the proceedings as *amici*. On 2 May 2019, Duke and the *amici* filed motions and comments in opposition to Cube’s Petition. Cube filed a reply comment on 9 May 2019.

¶ 5 On 4 September 2019, the Commission entered an Order Issuing Declaratory Ruling (the “Order”) concluding “that Cube’s proposed landlord/tenant arrangement . . . would cause Cube to be a public utility” and would not qualify for the landlord/tenant exemption. The Commission denied Cube’s Petition with prejudice. Cube timely appealed.

II. Analysis

¶ 6 Cube contends that the Commission “erred in concluding that Cube does not qualify for the landlord-tenant exemption to ‘public-utility’ status” due to its misapplication of the governing law and incorrect interpretation of multiples terms or phrases used in N.C. Gen. Stat.

Progress, LLC (also a party to the current appeal), under the moniker of a qualifying facility in compliance with the Public Utility Regulatory Policies Act. *See Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, 269 N.C. App. 1, 2, 837 S.E.2d 144, 145 (2019). This matter is currently on remand to the Commission from the decision of this Court.

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§ 62-3(23)(d). In response, Duke and its *amici* contend, *inter alia*, that the Commission's decision is void *ab initio* because the Commission and our Court lack jurisdiction to issue an advisory opinion where Cube has not presented an actual, justiciable controversy.

¶ 7 Cube requested that the Commission issue a declaratory judgment that its Proposed Plan fulfilled the statutory requirements to qualify for exemption from regulation as a public utility. Chapter 62 of the North Carolina General Statutes defines and prescribes the way public utilities are regulated within the state. *See* N.C. Gen. Stat. § 62-2 (2019) (explaining that the availability of electric power is a matter of public policy and vesting the Commission with authority to regulate such availability as a public utility); N.C. Gen. Stat. § 62-3(23) (2019) (defining "public utility"). Section 62-3(23)(d) exempts from the definition of a "public utility" an entity acting in a landlord/tenant relationship:

Any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others.

N.C. Gen. Stat. § 62-3(23)(d)(4) (2019).

¶ 8 "A declaratory judgment may be used to determine the construction and validity of a statute." *Town of Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987) (citation omitted). "[A] declaratory judgment should issue '(1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.'" *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002).

¶ 9 Nonetheless, "neither the Utilities Commission nor the appellate courts of this State have the jurisdiction to review a matter which does not involve an actual controversy." *State ex rel. Utilities Comm'n v. Carolina Water Serv., Inc. of N.C.*, 149 N.C. App. 656, 657–58, 562 S.E.2d 60, 62 (2002). "To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the [petition] that litigation appears unavoidable." *Wendell v. Long*, 107 N.C. App. 80, 82–83, 418 S.E.2d 825, 826 (1992) (citations omitted). "Mere apprehension or the mere threat of an action or suit is not enough." *Id.* at 83, 418 S.E.2d at 826. A declaratory judgment is not a vehicle in which litigants may "come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) (citation omitted). Essentially, a party may only

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request a judgment declaring a particular interpretation of a statute if they are “directly and adversely affected” by application of the statute to their actual circumstances. *See Byron v. Synco Properties, Inc.*, 258 N.C. App. 372, 373, 377, 813 S.E.2d 455, 457, 460 (2018) (“Landowners whose property is not directly and adversely affected by a . . . statute do not have standing to bring a declaratory judgment action to challenge the . . . interpretation of the statute.”).

¶ 10 “A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citation omitted). The existence of an actual controversy is a jurisdictional prerequisite to any judicial action based thereon. *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986). This Court reviews challenges to its jurisdiction *de novo* and may do so for the first time at any stage of the proceedings. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

¶ 11 Cube submitted to the Commission its Proposed Plan which purports to satisfy each of the requirements of section 62-3(23)(d). According to Cube’s Petition, Cube has made “[p]reliminary contact” and entered into “active negotiations” with “a number of potential tenants[,]” with whom Cube believes “binding lease agreements *could* be reached” if it can receive a favorable declaratory ruling with respect to its Proposed Plan. (Emphasis added). However, Cube concedes that it has not yet entered into any leasing contracts creating a landlord/tenant relationship, does not currently have any ownership interest in real property in the Badin Business Park, and is not under contract to acquire any real property in Badin Business Park. It appears from the Record that Cube intends to make formal efforts to acquire the very land it intends to develop and lease only after the Commission approves of its Proposed Plan.

¶ 12 Cube has no present interest in the resolution of its question. It is not in a realized adversarial position to Duke. Cube owns and operates four hydroelectric facilities which *could* be used to provide electric energy in ways that *would* provoke an adversarial relationship with Duke. Those facilities are not currently used in those ways. Cube has no legal duties that demand it conduct acts in compliance which would unavoidably lead to litigation with Duke. Rather, Cube effectively asks this Court to serve as its general counsel, advising whether its plan to purchase real property and embark on a particular business venture is a legal use of its time and resources. *See Mears*, 231 N.C. at 117, 56 S.E.2d at 409 (“The Uniform Declaratory Judgment Act does not license litigants to

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fish in judicial ponds for legal advice.”). In short, the controversy that Cube has asked our Courts and the Commission to decide simply does not yet exist.

¶ 13 We note that Cube repeatedly asserts that the Public Staff of the Commission informed the Commission of its belief that Cube’s Proposed Plan proffered a landlord/tenant relationship exempt from public utility regulation. However, interest and participation by the Public Staff in the resolution of a party’s question does not bestow jurisdiction upon this Court. In *State ex rel. Utilities Commission v. Carolina Water Services, Inc. of North Carolina*, the Public Staff itself petitioned for a declaratory judgment that certain water service provisions in proposed contractual agreements were unenforceable; this Court nonetheless found no justiciable controversy upon which it could rule. *Carolina Water Servs.*, 149 N.C. App. at 659–60, 562 S.E.2d at 63.

¶ 14 The Dissent correctly states that litigation is not unavoidable where an impediment exists and must be removed before litigation may occur, *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 328 N.C. 557, 561, 402 S.E.2d 623, 626 (1991), but respectfully errs in reaching the conclusion that there is no impediment to future litigation in this case. According to the Dissent, “[w]ere Cube to have proceeded with negotiations with prospective tenants of the proposed full-service lease . . . , there would have been no impediment to litigation against Cube by Duke or other electric providers.” This is not the case. There is no indication in the Record before this Court that Cube has the ability to purchase the Baden Business Park now or at any point in the future. Cube’s inability to purchase the very land it is proposing to rent to any number of unnamed and uncertain tenants can surely be labeled an “impediment” to future litigation. Because Cube may never be able to proceed with its Proposed Plan, and has nothing binding it to moving forward on that Proposed Plan, there is “a lack of practical certainty that litigation w[ill] commence if a declaratory judgment [is] not rendered” in this case. *Am. Civ. Liberties Union of N.C., Inc., v. State*, 181 N.C. App. 430, 433, 639 S.E.2d 136, 138 (2007). Put another way, there is no certainty that Cube’s position is actually adversarial to Duke’s exclusive franchise service rights. Cube claims to have a roster of signable players and assuredly possesses the basketballs, the jerseys, and an itch to blow that first whistle, but will never be allowed to play against Duke if the arena owner refuses to allow Cube on the court.

¶ 15 Cube has shown no evidence that it owns the legal right to lease the real property required to fulfill its Proposed Plan, has shown no evidence that it would be able to acquire that real property, and

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has presented only encouraging affirmations from potential tenants. “There is nothing to make it appear reasonably certain that if the courts agree with [Cube] and declare [its Proposed Plan exempted from regulation] that [Cube] will engage in the covered activities rather than ‘put [the opinion] on ice to be used if and when occasion might arise.’” *Sharpe*, 317 N.C. at 589–90, 347 S.E.2d at 32 (quoting *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942)). We hold that Cube has failed to bring a justiciable controversy before this Court and the Commission below.

III. Conclusion

¶ 16 The Record before this Court shows that Cube failed to present the Commission with a justiciable controversy. We vacate the Commission’s Order.

VACATED.

Judge DIETZ concurs by separate opinion.

Judge JACKSON dissents by separate opinion.

DIETZ, Judge, concurring.

¶ 17 The simplest way to see the flaw in my dissenting colleague’s opinion is to imagine this case arriving directly at the courts, without a trip through the Utilities Commission.

¶ 18 The scenario is this: A business comes to court seeking a declaratory judgment. The business is currently in court fighting over the legality of its business model. While that suit is pending, the business comes up with an alternative idea that would permit it to abandon its first proposal in favor of a new business model. This new approach requires the business to buy land, enter into leases with other businesses, and then begin operating with the new, different business model.

¶ 19 But, the business acknowledges, it hasn’t yet bought the land, it hasn’t yet entered into leases with the other businesses, and it hasn’t even committed to pursuing this alternative business model in lieu of its existing model.

¶ 20 The courts would not entertain a declaratory judgment action concerning the legality of this alternative proposal. The judgment would be an impermissible advisory opinion that could be “put on ice to be

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used if and when occasion might arise.” *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 590, 347 S.E.2d 25, 32 (1986).

¶ 21 The dissent focuses on the fact that *if* Cube decides to pursue its alternative proposal, and *if* it is able to acquire the land to lease, and *if* it finds businesses who want to lease the land, then it is a “practical certainty” that Duke will challenge this business model through litigation. Thus, the dissent reasons, litigation is unavoidable. But that is true only if one ignores all the ifs.

¶ 22 Businesses routinely find themselves in this situation. They address the uncertainty by relying on the advice of legal counsel, and by drafting contracts that account for the uncertainty through contingency clauses and price concessions. They cannot force the courts to stand in as legal counsel and offer an advisory opinion that carries the force of a binding legal judgment. *Id.*

¶ 23 Nothing about this scenario changes because Cube first brought its declaratory judgment claim to the Utilities Commission instead of directly to court. To be sure, given the complexity of our utilities laws and regulatory regime, it may be good policy to permit the Commission and its staff to issue advisory rulings to firms like Cube. But that policy question is one for the General Assembly. Cube’s request for declaratory relief through a judicial ruling under N.C. Gen. Stat. § 1-253 seeks an impermissible advisory opinion from the judicial branch and is not justiciable.

JACKSON, Judge, dissenting.

¶ 24 The majority holds that Cube Yadkin Generation, LLC (“Cube”) has failed to present the North Carolina Utilities Commission (the “Commission”) with a justiciable controversy, and consequently, it vacates the Commission’s Order. I disagree, and therefore respectfully dissent.

I. Our Declaratory Judgment Act

¶ 25 North Carolina’s Uniform Declaratory Judgment Act (“the Act”) empowers

[c]ourts of record within their respective jurisdictions . . . to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

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N.C. Gen. Stat. § 1-253 (2019). “The essential distinction between a declaratory judgment action and any other action for relief is that a declaratory judgment action may be maintained without actual wrong or loss as its basis.” *McCabe v. Dawkins*, 97 N.C. App. 447, 449, 388 S.E.2d 571, 572 (1990) (citation omitted).

The Act recognizes the need of society for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the status quo. It satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations.

Lide v. Mears, 231 N.C. 111, 117-18, 56 S.E.2d 404, 409 (1949) (internal marks and citation omitted). “The purpose of the Act ‘is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations and is to be liberally construed and administered.’ ” *Am. Civ. Liberties Union of N.C., Inc. v. State*, 181 N.C. App. 430, 432, 639 S.E.2d 136, 138 (2007) (quoting *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932)).

¶ 26

However, an action for a declaratory judgment must present an actual controversy for a trial court to have subject matter jurisdiction over it. *Time Warner Ent. Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 514-15, 747 S.E.2d 610, 614 (2013). While “the definition of a ‘controversy’ . . . depend[s] on the facts of each case, a ‘mere difference of opinion between the parties’ does not constitute a controversy[.]” *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (citation omitted), because “courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions[.]” *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) (citations omitted), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972). Additionally, despite sounding similar, the actual controversy

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requirement under the Act is less demanding than the “‘case or controversy’ requirement of Article III of the United States Constitution[.]” *Time Warner Ent. Advance/Newhouse P’ship*, 228 N.C. App. at 514-15, 747 S.E.2d at 614. *See also Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 2021-NCSC-6, ¶ 73 (2021) (“[W]here a purely statutory or common law right is at issue, . . . a showing of direct injury beyond the impairment of the common law or statutory right is not required.”).

¶ 27 Generally speaking, “[t]he court has jurisdiction if the judgment will prevent future litigation.” *Little*, 252 N.C. at 244, 113 S.E.2d at 701. “Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable.” *Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 61. Our Supreme Court has explained that litigation is not unavoidable if “there [is] an impediment to be removed before court action c[an] be started.” *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 328 N.C. 557, 561, 402 S.E.2d 623, 626 (1991). In other words, “a lack of practical certainty that litigation w[ill] commence if a declaratory judgment [is] not rendered” constitutes an impediment to litigation. *Am. Civ. Liberties Union of N.C.*, 181 N.C. App. at 434, 639 S.E.2d at 138-39. Similarly, an impediment to litigation may exist where “the action in controversy has not been performed but is merely speculative, or . . . the ordinance that is the subject of the suit has not been enacted but merely has been proposed.” *Id.* at 434, 639 S.E.2d at 139 (citations omitted). However, “[w]hen no impediment is present, . . . the case is justiciable[.]” *Id.*

¶ 28 Thus, while “the Declaratory Judgment Act does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise[.]” *Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 62 (internal marks and citation omitted), or “license litigants to fish in judicial ponds for legal advice . . . [.] [it] enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment[.]” *Lide*, 231 N.C. at 117-18, 56 S.E.2d at 409.¹ Accordingly, though “[m]ere apprehension or the mere threat of an

1. The Act thus “permits the courts to review certain disputes at an earlier stage than was normally permitted at common law.” *State ex rel. Utils. Comm’n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 62 (2002). *See also McCabe v. Dawkins*, 97 N.C. App. 447, 449, 388 S.E.2d 571, 573 (1990) (“A declaratory judgment cause of action did not exist at common law because common law only redressed private wrongs and crimes.”).

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action or a suit is not enough” to meet the actual controversy requirement of the Act, *Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 62, “the plaintiff need not have already sustained an injury to file suit under the Act[.]” *Am. Civ. Liberties Union of N.C.*, 181 N.C. App. at 433, 639 S.E.2d at 138.

II. Standard of Review

¶ 29 The actual controversy requirement under the Act is an issue of subject matter jurisdiction. *Time Warner Ent. Advance/Newhouse P'ship*, 228 N.C. App. at 514, 747 S.E.2d at 614. Subject matter jurisdiction is “reviewed *de novo* on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

III. The Justiciability of Cube's Petition

¶ 30 I would hold that Cube's petition presented a justiciable controversy—namely, the issue of whether the full-service lease proposed by Cube, without any usage charge for electricity, would be a sale of electricity within the meaning of Chapter 62 of our General Statutes. Specifically, the justiciable controversy presented by Cube's petition was whether Cube's plan for providing tenants with electricity generated from its own hydroelectric generation facilities located in or nearby the Business Park or obtaining additional electricity to provide to tenants at the Business Park under a full-service lease would qualify Cube for exclusion from public utility regulation under the landlord/tenant exemption contained in N.C. Gen. Stat. § 62-3(23)d. As the Public Staff of the Commission noted in its 9 May 2019 Reply Comments, “[t]he positions taken by Duke and other electric providers make clear that if Cube were to enter leases consistent with its proposal in the absence of a declaratory ruling in its favor, it would likely face legal action by Duke and other parties. A declaratory judgment will enable the parties to enter contracts and make investments without the uncertainty posed by future litigation.”

¶ 31 Were Cube to have proceeded with negotiations with prospective tenants of the proposed full-service lease rather than first seek a declaratory judgment from the Commission that the full-service lease fell within the landlord/tenant exemption contained in N.C. Gen. Stat. § 62-3(23)d, there would have been no impediment to litigation against Cube by Duke or other electric providers: (1) Cube owns the hydroelectric generation facilities at issue and 17 miles of transmission lines that interconnect the

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hydroelectric facilities with the electric grid and an electric substation at the Business Park; (2) Duke has exclusive franchise service rights under N.C. Gen. Stat. § 62-110 in the geographic area at issue; (3) Duke promptly filed petitions to intervene in Cube's action after learning of it; and (4) Duke thereafter formally opposed the action and moved for its dismissal. Indeed, I conclude that based on the pleadings and record in this case there is a practical certainty Duke would have commenced litigation against Cube if Cube had obtained site control of the Business Park and entered leases with tenants there consistent with the terms of the proposed full-service lease rather first seeking a declaratory judgment from the Commission. After all, this matter involved investments of potentially tens of millions of dollars. A decision in Cube's favor would allow it to move forward with the proposal and a decision against it would mean it could move in another direction, without the need to spend further time or money on this proposal. I would therefore hold that Cube's petition presented a justiciable controversy. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JARED WADE FLANAGAN, DEFENDANT

No. COA20-577

Filed 7 September 2021

Probation and Parole—jurisdiction—superior court—appeal from district court—revocation of probation—waiver of revocation hearing

The superior court lacked jurisdiction to hear defendant's appeal from the district court's orders revoking his probation for various misdemeanor offenses, where defendant waived his revocation hearing and admitted to violating the conditions of his probation. Importantly, N.C.G.S. § 15A-1347(b) precludes appeal of a sentence reactivation to the superior court where the defendant waives a revocation hearing.

Appeal by Defendant from judgments entered 5 February 2020 by Judge Angela B. Puckett in Stokes County Superior Court. Heard in the Court of Appeals 23 March 2021.

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[279 N.C. App. 228, 2021-NCCOA-456]

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Jason Christopher Yoder, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Jared Flanagan (“Defendant”) appeals from judgments of the trial court revoking his probation for various misdemeanor offenses. Defendant’s notice of appeal failed to comport with Rule 4 of our rules of appellate procedure, and he asks this Court to allow his petition for writ of certiorari (“PWC”) to reach the merits of his appeal. Defendant seeks our review of the revocation order, because the trial court failed to find good cause to revoke his probation. After careful review, we find the Stokes County Superior Court lacked jurisdiction to hear Defendant’s appeal. Thus, we grant Defendant’s PWC and vacate the judgment of the Stokes County Superior Court and reinstate the judgment of the Stokes County District Court.

I. Background

¶ 2 On July 19, 2018, Defendant pleaded guilty in Forsyth County District Court to first-degree trespass and larceny (file no. 17 CR 60920). The trial court sentenced Defendant to one hundred twenty days in the custody of the Misdemeanant Confinement Program,¹ suspended for twelve months of supervised probation. On August 24, 2018, Defendant pleaded guilty to possession of drug paraphernalia (file no. 18 CR 56369). The trial court sentenced Defendant to one hundred twenty days in the custody of the Misdemeanant Confinement Program, suspended for twelve months of supervised probation and ordered as a special condition of his probation that Defendant report for initial evaluation for a substance abuse assessment. On October 23, 2018, Defendant pleaded guilty to felony larceny (file no. 17 CR 61748). Defendant was sentenced to sixty days in the Forsyth County Jail, suspended for twelve months of supervised probation and ordered as a special condition of probation to serve ten days in the Forsyth County Jail.

¶ 3 On December 7, 2018, while subject to the restrictions of his probation, Defendant tested positive for opiates. On December 23, 2018,

1. The Misdemeanant Confinement Program, administered by the North Carolina Sheriff’s Association, houses all misdemeanants and people convicted of drunk driving at county jails that have voluntarily agreed to participate in the program. <https://www.doc.state.nc.us/jr/misdemeanors.html>.

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Defendant was charged in Forsyth County with second-degree trespass and misdemeanor larceny. On December 28, 2018, Defendant was charged with two counts of shoplifting concealment of goods. On January 3 and 17, 2019, Defendant failed to report to Treatment Accountability for Safer Communities care management services in violation of the terms of his probation. As a result, Defendant was terminated from the program. Defendant also failed to attend a scheduled appointment with Daymark Recovery Services for substance abuse services. Defendant failed to report to the Forsyth County Jail to serve his special condition of probation as ordered by the trial court on weekends in November and December 2018 and January 4, 2019. Defendant's probation officer, Tiffany Lynch ("PO Lynch"), testified Defendant had only completed four days of his special condition of probation as of the date of his revocation hearing.

¶ 4 PO Lynch filed violation reports in Stokes County District Court alleging that Defendant violated his probation in file nos. 19 CR 17-19 (the "misdemeanor cases") by committing new criminal offenses on January 18, 2019. The violation report gave notice of a revocation hearing scheduled on March 4, 2019. Two days later, Defendant stole multiple items from a Walmart in Stokes County. On April 1, 2019, Defendant failed to appear for a scheduled court date and also failed to report for a scheduled office visit with PO Lynch.

¶ 5 On April 3, 2019, a law enforcement officer stopped Defendant and his vehicle in Forsyth County for a traffic violation. Following that traffic stop, Defendant was arrested on multiple charges because he was found to be in possession of drug paraphernalia; tried to strike an officer with his vehicle; obstructed the investigation by driving away; drove without a driver's license and while displaying a license plate registered for another vehicle; drove recklessly, failed to maintain lane control, failed to stop at a stop sign; failed to wear a seat belt; and fled in his vehicle to elude arrest.

¶ 6 The following day, PO Lynch filed additional probation violation reports alleging Defendant absconded supervision, failed to report to PO Lynch, and committed new criminal offenses. PO Lynch also alleged that, during the April 3, 2019 incident, Defendant was using heroin in a Winston-Salem park and that he "is a danger to himself and the community."

¶ 7 On October 22, 2019, Defendant pleaded guilty in Stokes County Superior Court to felony larceny from a merchant and to misdemeanor larceny (19 CRS 50404-05). The trial court sentenced Defendant to

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a minimum of nine, maximum of twenty months in custody, suspended for eighteen months of supervised probation. On October 29, 2019, Defendant pleaded guilty in Forsyth County Superior Court to attempted assault with a deadly weapon on a government official and resisting a public officer (19 CRS 53256); driving while license revoked and reckless driving (19 CRS 53257); possession of drug paraphernalia (19 CRS 53262); and fleeing to elude arrest with a motor vehicle (19 CRS 53263). The trial court sentenced Defendant to a minimum of fifteen, maximum of twenty-seven months, suspended for a term of thirty-six months of supervised probation.

¶ 8 Defendant failed to report to PO Lynch in Stokes County or his Forsyth County Courtesy Officer for his November 14, 2019 appointment. PO Lynch reported Defendant told his Forsyth County Courtesy Officer that he would be unable to attend his November 14, 2019 appointment with the Forsyth County Courtesy Officer because he was working out of town. However, around November 15, 2019, Defendant was charged in Forsyth County with misdemeanor larceny at a Walmart. His presence at Walmart was a violation of a prior court order prohibiting Defendant from being on the premises of any Walmart. On November 22, 2019, Defendant was charged in Stokes County with resisting a public officer.

¶ 9 On December 2, 2019, Defendant appeared before the Stokes County District Court for a hearing on the January 18, and April 4, 2019 violation reports. While in the Stokes County District Court, Defendant both waived his violation hearing and admitted he violated the conditions of his probation. That same day, the Stokes County District Court entered orders revoking Defendant's probation and activating the suspended sentences in the misdemeanor cases. The trial court imposed his sentence of one hundred twenty days in the Misdemeanant Confinement Program and gave him credit for ninety-two days of prior confinement; his sentence of one hundred twenty days in the Misdemeanant Confinement Program; and his consecutive sentence of sixty days in the Stokes County Jail. After learning his probation was being revoked, Defendant ran out of the courtroom, was quickly apprehended in the courthouse, and ordered to serve thirty days in jail for criminal contempt of court. Defendant gave notice of appeal to the Stokes County Superior Court.

¶ 10 On December 23, 2019, PO Lynch filed violation reports in the Stokes County Superior Court, alleging that Defendant had violated the terms of his probation in file nos. 19 CRS 50404-05, and in 19 CRS 053256-57 and 19 CRS 053262-63 (renamed in Stokes County as file no. 19 CRS 459). The report gave notice of a hearing scheduled for February 5, 2020.

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¶ 11 On February 5, 2020, Defendant appeared before the Stokes County Superior Court. At the hearing, Defendant admitted to willfully violating his probation as alleged in the violation reports in the Superior Court probation files. The Stokes County Superior Court found Defendant had violated his probation and entered five judgments revoking Defendant's probation and activating his suspended sentences in the misdemeanor cases, and in 19 CRS 50404-05 and 19 CRS 459 (the felony cases). On February 11, 2020, Defendant filed written notice of appeal regarding the misdemeanor cases and the felony cases.² The misdemeanor cases are the only cases currently before us.

¶ 12 On August 10, 2020, Defendant filed a PWC with this Court. Defendant filed a PWC because his appeal failed to "identify the '[C]ourt to which appeal is taken.'" N.C. R. App. P. 4(b). Because Defendant failed to comply with Rule 4 of our rules of appellate procedure, Defendant asks this Court to exercise its discretion and issue a writ of certiorari to permit appellate review. In our discretion, we allow the petition to consider the merits of Defendant's appeal.

II. Discussion

¶ 13 At the outset, we must first determine whether the Stokes County Superior Court possessed jurisdiction to hear Defendant's appeal from the Stokes County District Court. The question of whether a superior court has appellate jurisdiction over a district court's revocation of probation and subsequent activation of a sentence when the defendant has waived his revocation hearing is an issue of first impression before this Court.

¶ 14 The right to appeal in a criminal case is "purely a creation of state statute." *State v. Pennell*, 228 N.C. App. 708, 710, 746 S.E.2d 431, 433 (2013) (quoting *State v. Singleton*, 201 N.C. App. 620, 623, 689 S.E.2d 562, 564 (2010)), *rev'd in part*, 367 N.C. 466, 758 S.E.2d 383 (2014). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*,

2. While Defendant appealed in the Stokes County Superior Court on February 11, 2020, his notice of appeal failed to designate a court from which his appeal is taken pursuant to Rule 4 of our rules of appellate procedure. Defendant filed a PWC with this Court, seeking our review of the revocation of his probation for his misdemeanor offenses. As Defendant did not argue the trial court impermissibly revoked his felony probation in his appellate briefing, we need not address this issue. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

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360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975)).

¶ 15 Concerning jurisdiction over probational matters, the ability of a court “to review a probationer’s compliance with the terms of his probation is limited by statute.” *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (quoting *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005)). We are guided by N.C. Gen. Stat. § 15A-1347 which states in relevant part,

(a) [W]hen a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing

(b) If a defendant waives a revocation hearing, the finding of a violation of probation, activation of sentence, or imposition of special probation *may not* be appealed to the superior court.

N.C. Gen. Stat. § 15A-1347(a)-(b) (2021) (emphasis added).

¶ 16 Following from the plain language of Section 15A-1347(b) is the conclusion that the superior court may not hear an appeal from the district court concerning the activation of a sentence, special probation imposition, or finding of a probation violation if the defendant waived a revocation hearing. *See id.* The direct result of Section 15A-1347(b) is that the superior courts’ jurisdiction is limited by a defendant’s action in the district court. If a defendant chooses to waive his revocation hearing, then the natural consequence proscribed by Section 15A-1347(b) is that the defendant may not thereafter appeal his special probation imposition, sentence activation, or finding of violation of probation by the district court to the superior court. To accept such an appeal would cause the superior court to act in excess of its jurisdictional boundaries imposed by the General Assembly in Section 15A-1347(b).

¶ 17 Here, Defendant both waived his violation hearing and admitted to violating the conditions of his probation during his December 2, 2019 Stokes County District Court hearing. After the District Court revoked Defendant’s probation and activated his sentence, Defendant appealed to the Stokes County Superior Court. Despite Defendant’s waiver of his violation hearing in the District Court, the Stokes County Superior Court heard Defendant’s appeal on February 5, 2020. Since we have determined that Section 15A-1347(b) precludes appeal to the superior court

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when a defendant waives his revocation hearing, we that hold that the Stokes County Superior Court lacked jurisdiction to hear Defendant's appeal. To hold otherwise would permit the Superior Court to exceed its jurisdiction and operate beyond the jurisdictional boundaries established by our General Assembly.

¶ 18 Although we have yet to consider Section 15A-1347(b) as a jurisdictional bar, we turn to relevant case law for further guidance in reaching our decision. In *State v. Miller*, our Supreme Court explained because the ability to suspend a sentence is favorable to the defendant, when the defendant "sits by as the order is entered and does not then appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence." 225 N.C. 213, 215, 34 S.E.2d 143, 145 (1945). The defendant would thus "commit[] himself to abide by the stipulated conditions [and] . . . may not be heard thereafter to complain that his conviction was not in accord with due process of law." *Id.* In *State v. Smith*, our Supreme Court reasoned because the defendant did not object when the condition was implemented, his conduct "impliedly consented thereto and [he] committed himself to abide by the terms of the probation." 233 N.C. 68, 70, 62 S.E.2d 495, 496 (1950).

¶ 19 Naturally flowing from our Supreme Court cases is the proposition that when a defendant assents during a conviction, he generally may not later appeal on the basis of that to which he previously assented. In the present case, Defendant assented to waiving the violation hearing and admitted violating the conditions of his probation. Defendant in no way contested the charges against him. Defendant's waiver of his violation hearing precludes him from appealing to the Superior Court from the results that flow from Section 15A-1347(b), including the activation of his suspended sentence.

¶ 20 Next, concerning revocation hearings in *State v. Romero*, we held because "Defendant did not contest the validity of the community service requirement at any point during the revocation hearing," the defendant had "waived this challenge." 228 N.C. App. 348, 351-52, 745 S.E.2d 364, 367 (2013). Similarly, in *State v. Tozzi*, we held a defendant cannot for the first time bring an objection to his probation on appeal but "must first object no later than the revocation hearing." 84 N.C. App. 517, 520, 353 S.E.2d 250, 252 (1987). Here, Defendant's waiver of his revocation hearing means he did not contest or object to the alleged violations of his probation. Thus, under Section 15A-1347(b), Defendant lost the right to appeal the District Court's finding of a violation of probation, special probation sentence, or an activation of his sentences.

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¶ 21 The Stokes County Superior Court did not have jurisdiction to hear Defendant's appeal from the Stokes County District Court. The language of Section 15A-1347(b) clearly states that a waiver of a revocation hearing and subsequent finding of violation of probation, activation of a sentence, or imposition of a special probation precludes an appeal to the superior court. Because Defendant waived his revocation hearing in the Stokes County District Court then appealed the District Court's revocation and suspension activation to Stokes County Superior Court, the Superior Court was barred by N.C. Gen. Stat. § 15A-1347(b) from hearing Defendant's appeal.

¶ 22 Defendant asks us to consider whether the trial court erred by holding a revocation hearing after the expiration of Defendant's probation without first making a finding of fact that the State had shown good cause for the probation hearing. We need not consider the merits of this argument because N.C. Gen. Stat. § 15A-1347(b) prohibited Defendant from appealing the Stokes County District Court decision to activate Defendant's sentence to the Stokes County Superior Court.

III. Conclusion

¶ 23 The decision of the Stokes County Superior Court is vacated, and the judgment of the Stokes County District Court is reinstated.

VACATED.

Judges INMAN and GRIFFIN concur.

STATE v. GUERRERO

[279 N.C. App. 236, 2021-NCCOA-457]

STATE OF NORTH CAROLINA

v.

PAYTON B. GUERRERO, DEFENDANT

No. COA20-722

Filed 7 September 2021

1. Motor Vehicles—impaired driving—specific jury instruction—chemical analysis results—as proof of alcohol concentration

In a prosecution for impaired driving, where the trial court instructed the jury that the “results of a chemical analysis are deemed sufficient evidence to prove a person’s alcohol concentration,” the court did not err by denying defendant’s request for a special jury instruction clarifying that this statement merely explains the standard for prima facie evidence of a person’s alcohol concentration and does not create a legal presumption of defendant’s guilt. The court adequately conveyed the substance of defendant’s requested instruction by instructing the jurors that they were “the sole judges of the weight to be given to any evidence,” that they “should consider all the evidence,” and that it was their “duty to find the facts and to render a verdict reflecting the truth.”

2. Sentencing—impaired driving—mitigating factors—statutory step-by-step formula—prejudice analysis

At a sentencing hearing for an impaired driving conviction, where defendant argued that three mitigating factors under N.C.G.S. § 20-179 existed but where the trial court only found one mitigating factor, the court erred by not finding one of the other factors (that defendant had a safe driving record) where defendant met his burden of proving that factor by a preponderance of the evidence. However, this error did not prejudice defendant because it did not cause the court to enter a sentence in excess of the presumptive term; rather, because the court determined under section 20-179’s step-by-step formula that any mitigating factor substantially outweighed any aggravating factors, it was statutorily required to impose a Level Five punishment.

3. Sentencing—presumption of regularity—severity of sentence—no improper considerations

At the sentencing phase of an impaired driving prosecution, where defendant’s sentence fit within the statutory limit and was therefore presumptively regular and valid, defendant could not overcome the presumption of regularity by showing that the trial

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court sentenced him more harshly for exercising his right to a jury trial or that it improperly based the sentence on uncharged criminal conduct. Although the court stated that it would give defendant the same sentence he received in his prior trial (for the same charge) if he wanted to “accept responsibility,” the court also said that its job was not to punish defendant for rejecting a plea offer but to be fair and impartial. Additionally, defendant did not assert his Fifth Amendment privilege, object, or ask to speak with his attorney when the court questioned him about his prior illegal drug use.

Appeal by Defendant from judgment entered 16 December 2019 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle McCullen, for the State.

John P. O’Hale for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Payton B. Guerrero appeals from a judgment entered after a jury found him guilty of impaired driving. Defendant argues that the trial court erred by (1) denying Defendant’s request for a special jury instruction; (2) failing to find two statutorily mandated mitigating factors; and (3) sentencing Defendant more harshly for exercising his right to a jury trial. We conclude that Defendant received a fair trial, free from reversible error.

I. Factual and Procedural History

¶ 2 On 15 December 2018, a North Carolina State Highway Patrol trooper placed Defendant under arrest for driving while impaired. The trooper took Defendant to the Johnston County Jail where Defendant provided a breath sample to be analyzed by the Intoximeter EC/IR II. The Intoximeter reported an alcohol concentration of 0.09.

¶ 3 Defendant pled not guilty to impaired driving in Johnston County District Court. Following a bench trial, the judge found Defendant guilty of impaired driving and imposed a Level Five sentence pursuant to N.C. Gen. Stat. § 20-179. Defendant gave notice of appeal in open court.

¶ 4 The case was called for trial in Johnston County Superior Court. Defendant submitted a request for the following special jury instruction:

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I instruct you, ladies and gentlemen of the jury, that phrase “once it is determined that the chemical analysis of the defendant’s breath was performed in accordance with the applicable rules and regulations, then a reading of 0.08 or more grams of alcohol per 210 liters of breath constitutes reliable evidence and is sufficient to satisfy the State’s burden of proof as to this element of the offense of DWI” is a statement of the standard for prima facie evidence of a person’s alcohol concentration sufficient to submit the case to the jury for its consideration. This statement does not create a legal presumption of the defendant’s alcohol concentration or the defendant’s guilt. As I have earlier instructed you what, if anything, the evidence tends to show, is for you, the members of the jury, to determine.

The trial judge denied Defendant’s request for the special jury instruction and delivered the following Pattern Instruction to the jury:

[D]efendant has been charged with impaired driving. For you to find [D]efendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that [D]efendant was driving a vehicle; second, that [D]efendant was driving that vehicle upon a highway or street within the state . . . [;] and third, at the time [D]efendant was driving that vehicle, [D]efendant had . . . consumed sufficient alcohol that at any relevant time after the driving [D]efendant had an alcohol concentration of 0.08 or more grams of alcohol per . . . 210 liters of breath. A relevant time is any time after the driving that the driver still has in the body alcohol consumed before or during the driving. The results of a chemical analysis are deemed sufficient evidence to prove a person’s alcohol concentration.

Additionally, the judge instructed the jurors that (1) they “are the sole judges of the weight to be given to any evidence”; (2) they “should weigh all the evidence in the case”; (3) they “should consider all the evidence”; and (4) “it is [their] duty to find the facts and to render a verdict reflecting the truth.” The jury found Defendant guilty of impaired driving.

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¶ 5 The judge held a sentencing hearing after the jury returned its verdict. The judge did not find any aggravating factors. Defendant argued for three statutorily mandated mitigating factors: (1) Defendant had a slight impairment of his faculties resulting solely from alcohol, and Defendant's alcohol concentration did not exceed 0.09 at any relevant time after the driving; (2) Defendant had a safe driving record; and (3) Defendant voluntarily submitted himself to a mental health facility for assessment and had voluntarily participated in all treatment recommended by such facility. Defendant submitted his driving record and substance abuse assessment to the court without objection from the State. Defendant did not submit proof that he voluntarily participated in the Alcohol Drug Education Traffic School ("ADETS") program recommended by his substance abuse assessment.

¶ 6 During the sentencing hearing, the judge stated,

I spoke to the attorneys, and I made an overture, and I said, [b]ased on the evidence, I'll give you the same thing that Judge Willis gave you, if you want to accept responsibility and move forward. Mr. O'Hale said, Judge, he has a right to a trial. And I said, I know. But I wanted to make sure that if we could work this out, because I said, with the number, there's a strong possibility this jury will come back with a guilty plea – a guilty verdict. I mean, jurors hear numbers. Now, one of the things about at the superior court level, my job is not to punish you because you didn't take an offer. That's not what it's about. My job is to be fair and impartial, as I'm always going to be.

The judge subsequently asked Defendant,

[L]et me ask you. You need to tell me the truth on this. Don't lie to me. If I have you tested today, what are you going to test illegal for? If it's marijuana or something like that, just tell me the truth now. Don't lie. Because if I have you tested and you lie, I'm going to hold you in contempt and give you 30 days. What will you test positive for if I test you today?

DEFENDANT: Just marijuana.

Defendant did not assert his Fifth Amendment privilege or object when the judge questioned him about his prior drug use. Counsel for Defendant was present, but Defendant did not ask to speak with his attorney and did not have any conference with counsel.

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¶ 7 The judge ultimately found one mitigating factor: that Defendant had a slight impairment of his faculties resulting solely from alcohol, and Defendant's alcohol concentration did not exceed 0.09 at any relevant time after the driving. He imposed a Level Five sentence. The judge sentenced Defendant to sixty days in jail and suspended the sentence. The judge placed Defendant on twelve months of supervised probation, "having received evidence and having found as fact that supervision is necessary." The special conditions of probation ordered that Defendant surrender his driver's license, complete twenty-four hours of community service within 180 days of the probation period, attend two Narcotics or Alcohol Anonymous classes per week, be tested for illegal substances thirty days from the sentencing date, and "remain on probation for the entire 12 [months]."

II. Analysis

¶ 8 Defendant argues that the trial court erred by (1) denying Defendant's request for a special jury instruction; (2) failing to find two statutory mitigating factors; and (3) sentencing Defendant more harshly for exercising his right to a jury trial.

A. Jury Instruction

¶ 9 [1] Defendant argues that the trial court erred by "not instructing the jury on . . . how to fully evaluate the State's Intoximeter evidence." Defendant claims the Pattern Instruction did not allow the jury an "adequate opportunity to fully weigh" the Intoximeter evidence "from the point of view of [Defendant's] theory of the case." We disagree.

When a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.

Calhoun v. State Highway and Pub. Works Comm'n, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935). Thus, "[a] specific jury instruction should be given when '(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.'" *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting

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Liborio v. King, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002)). “Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission.” *Id.*

¶ 10 In North Carolina, “[a] person commits the offense of impaired driving” when the individual

drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration.

N.C. Gen. Stat. § 20-138.1(a)(2) (2019). The phrase “results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration” is a “statement of the standard for prima facie evidence of a person’s alcohol concentration” and “does not create a legal presumption” or “prejudice to the defendant.” *State v. Narron*, 193 N.C. App. 76, 84–85, 666 S.E.2d 860, 865–66 (2008) (internal marks omitted). Instead, “[t]he statute simply authorizes the jury to find that the report is what it purports to be—the results of a chemical analysis showing the defendant’s alcohol concentration.” *Id.* at 84, 666 S.E.2d at 866.

¶ 11 Similarly, the North Carolina Supreme Court has held that the pattern jury instruction’s language stating the results of a chemical analysis shall be “deemed sufficient evidence to prove a person’s alcohol concentration[,]” and the language “adequately convey[s] the substance of [the] defendant’s requested instructions” when additional language explains that the jurors are “the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness” and “that if they decided that certain evidence was believable, they must then determine the importance of that evidence in light of all other believable evidence in the case.” *State v. Godwin*, 369 N.C. 604, 614–15, 800 S.E.2d 47, 53–54 (2017) (internal quotation marks omitted).

¶ 12 In *State v. Beck*, this Court held that instructing the jury that “(1) it was the ‘sole judge[] of the weight to be given [to] any evidence’; (2) it was the jury’s ‘duty to decide from [the] evidence what the facts are’; (3) the jury ‘should weigh all the evidence in the case’; and (4) the jury ‘should consider all of the evidence’” lets the jury know “that it possesse[s] the authority to determine the weight of any evidence offered to show that the [d]efendant was—or was not—impaired.”

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State v. Beck, 233 N.C. App. 168, 172, 756 S.E.2d 80, 83 (2014). Thus, statements such as these “signal[] to the jury that it [is] free to analyze and weigh the effect of the breathalyzer evidence along with all the evidence presented during the trial.” *Godwin*, at 614, 800 S.E.2d at 54.

¶ 13 In the present case, the trial court’s instruction, “in its entirety . . . encompass[es] the substance of the law requested.” *Outlaw*, 190 N.C. App. at 243, 660 S.E.2d at 559. Further, the trial judge instructed the jurors that (1) they “are the sole judges of the weight to be given to any evidence”; (2) they “should weigh all the evidence in the case”; (3) they “should consider all the evidence”; and (4) “it is [their] duty to find the facts and to render a verdict reflecting the truth.” The jury was not misled. As in *Godwin* and *Beck*, these statements “signaled to the jury that [they were] free to analyze and weigh the effect of the [Intoximeter] evidence along with all the evidence presented during the trial.” *Godwin*, at 614, 800 S.E.2d at 54.

B. Mitigating Factors

¶ 14 [2] Defendant argues that the trial court erred by failing to find two statutory mitigating factors. Defendant argues this error is prejudicial because he received supervised probation as part of his sentence. We disagree.

¶ 15 N.C. Gen. Stat. § 20-179 governs the sentencing of defendants convicted of impaired driving. *State v. Geisslercrain*, 233 N.C. App. 186, 190, 756 S.E.2d 92, 95 (2014). “[A] defendant’s sentencing range under N.C. Gen. Stat. § 20-179 is determined by the existence and balancing of aggravating and mitigating factors,” *id.*, and once a defendant is convicted for impaired driving, “the judge shall hold a sentencing hearing to determine whether there are aggravating or mitigating factors that affect the sentence to be imposed.” N.C. Gen. Stat. § 20-179(a) (2019). “The offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.” N.C. Gen. Stat. § 20-179(a)(1) (2019). “The sentencing judge is required to find a statutory factor when the evidence in support of it is uncontradicted, substantial, and manifestly credible.” *State v. Cameron*, 314 N.C. 516, 520, 335 S.E.2d 9, 11 (1985). “[W]henever there is error in a sentencing judge’s failure to find a statutory mitigating circumstance *and* a sentence in excess of the presumptive term is imposed, the matter must be remanded for a new sentencing hearing.” *State v. Daniel*, 319 N.C. 308, 315, 354 S.E.2d 216, 220 (1987) (emphasis added).

¶ 16 “Under [N.C. Gen. Stat.] § 20-179, there are six sentencing ranges.” *Geisslercrain*, 233 N.C. App. at 190, 756 S.E.2d at 95. “[T]he trial court

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is afforded much less discretion in sentencing under N.C. Gen. Stat. § 20-179 than under the Structured Sentencing Act.” *Id.* “The statutes governing [impaired driving] sentencing are quite systematic and tiered, thus leaving little room to exercise discretion.” *State v. Weaver*, 91 N.C. App. 413, 415–16, 371 S.E.2d 759, 760 (1988).

[T]he process resembles “pigeonholing” as the statutes supply the trial judge with the step-by-step formula; i.e., to review the evidence, to determine whether the evidence supports the factors listed in gross aggravation, aggravation, or mitigation, to weigh the factors supported by the evidence, and to determine the level of punishment.

Id. at 416, 371 S.E.2d at 760. “[I]f the trial court determines that [t]he mitigating factors substantially outweigh any aggravating factors, the trial court *must* impose a Level Five punishment.” *Geisslercrain*, 233 N.C. App. at 191, 756 S.E.2d at 95 (internal quotation marks omitted); N.C. Gen. Stat. § 20-179(f)(3) (2019). Level Five is the minimum sentencing level that a defendant can statutorily receive for impaired driving. N.C. Gen. Stat. §§ 20-179(f3)–(k) (2019). A Level Five sentence permits that a defendant

may be fined up to two hundred dollars [] and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant: (1) Be imprisoned for a term of 24 hours as a condition of special probation; or (2) Perform community service for a term of 24 hours; or . . . (4) Any of these conditions.

N.C. Gen. Stat. § 20-179(k) (2019). Additionally, a defendant may be placed on probation as part of a Level Five sentence. *Id.* (“If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by [N.C. Gen. Stat. §] 20-17.6 for the restoration of a drivers license and as a condition of probation.”). The General Assembly has provided trial courts a great deal of discretion in choosing the appropriate punishment within Level Five, including the choice between supervised and unsupervised probation. N.C. Gen. Stat. §§ 20-179(k), (r).

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¶ 17 In this case, Defendant did not establish the first mitigating factor he argues for: that Defendant voluntarily submitted himself to a mental health facility for assessment and has voluntarily participated in any treatment recommended by such facility. No evidence in the record shows that Defendant voluntarily participated in the ADETS treatment recommended by his substance abuse assessment.

¶ 18 As to the second mitigating factor—that Defendant had a safe driving record—we hold that Defendant met his burden of proof “by a preponderance of the evidence that a mitigating factor exists.” N.C. Gen. Stat. § 20-179(a)(1). Defendant submitted his driving record to the court without objection from the State. “[T]he evidence in support of [this factor was] uncontradicted, substantial, and manifestly credible.” *Cameron*, 314 N.C. at 520, 335 S.E.2d at 11. Therefore, the trial judge erred by failing to find this statutory factor.

¶ 19 However, the trial judge did not impose “a sentence in excess of the presumptive term.” *Daniel*, 319 N.C. at 315, 354 S.E.2d at 220. Using the “step-by-step formula” under the impaired driving sentencing statutes, the trial judge “determine[d] that [t]he mitigating factors substantially outweigh[ed] any aggravating factors,” so, the judge imposed a Level Five punishment under N.C. Gen. Stat. § 20-179. *Weaver*, 91 N.C. App. at 416, 371 S.E.2d at 760; *Geisslercrain*, 233 N.C. App. at 191, 756 S.E.2d at 95 (internal quotation marks omitted); N.C. Gen. Stat. § 20-179(f)(3).

¶ 20 Even if the trial judge had found the two additional mitigating factors, the judge could not have sentenced Defendant at a lower sentencing level under the “systematic and tiered” impaired driving statutes. *Weaver*, 91 N.C. App. at 415–16, 371 S.E.2d at 760. Defendant’s Level Five sentence, including probation, was allowed under the impaired driving statutes. N.C. Gen. Stat. § 20-179(k). Accordingly, Defendant cannot establish that he was prejudiced by the trial court’s failure to find his safe driving record as a mitigating factor.

¶ 21 It is important to emphasize that trial courts are mandated by N.C. Gen. Stat. § 20-179(e) to determine whether statutory mitigating factors are apparent before imposing a sentence: “The judge shall . . . determine before sentencing under subsection (f) of this section whether any of the mitigating factors listed [in subsection (e)] apply to the defendant.” N.C. Gen. Stat. § 20-179(e) (2019). Prior to sentencing, the trial judge stated, “[M]y hands are tied. I do have to find the mitigating factors. You’re right. And I respect that, and I’m going to find that mitigating factors exist.” Instead, the judge only found one mitigating factor in writing: slight impairment of Defendant’s faculties. Moreover, the judge

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did not orally state his findings regarding this factor or any other factor in mitigation before pronouncing Defendant's sentence. Although the judge repeatedly spoke of his "responsibility" as superior to the "objectives" of the litigants before the court, the judge did not fulfill his statutorily mandated responsibility to find mitigating factors. This is despite the fact that evidence supporting the mitigating factor was "uncontradicted, substantial, and manifestly credible." *Cameron*, 314 N.C. at 520, 335 S.E.2d at 11.

¶ 22 Although we discern no reversible error, it is important for trial judges to follow through with their responsibility to determine mitigating factors orally and in writing before imposing a sentence. Aside from being mandated by statute, this responsibility is integral to promoting our courts' interests in procedural fairness, transparency, and respect for litigants before the court.

C. Constitutional Error

¶ 23 [3] Defendant contends that the trial court erred by sentencing Defendant more harshly because (1) Defendant exercised his right to a trial by jury, and (2) "the trial court relied on . . . uncharged criminal conduct not found by the jury." Defendant claims his arguments are evidenced by the trial judge stating the following:

Now, as I said in chambers, I have no qualm saying it here, I spoke to the attorneys, and I made an overture, and I said, [b]ased on the evidence, I'll give you the same thing that Judge Willis gave you, if you want to accept responsibility and move forward. Mr. O'Hale said, Judge, he has a right to a trial. And I said, I know. But I wanted to make sure that if we could work this out, because I said, with the number, there's a strong possibility this jury will come back with a guilty plea – a guilty verdict. I mean, jurors hear numbers. Now, one of the things about at the superior court level, my job is not to punish you because you didn't take an offer. That's not what it's about. My job is to be fair and impartial, as I'm always going to be.

The judge continued speaking to Defendant:

THE COURT: [L]et me ask you. You need to tell me the truth on this. Don't lie to me. If I have you tested today, what are you going to test illegal for? If it's marijuana or something like that, just tell me the

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truth now. Don't lie. Because if I have you tested and you lie, I'm going to hold you in contempt and give you 30 days. What will you test positive for if I test you today?

DEFENDANT: Just marijuana.

We disagree with Defendant's two arguments.

¶ 24 “The standard of review for questions concerning constitutional rights is *de novo*.” *State v. Fernandez*, 256 N.C. App. 539, 544 808 S.E.2d 362, 367 (2017). Further, “[t]he extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review.” *State v. Johnson*, 265 N.C. App. 85, 87, 827 S.E.2d 139, 141 (2019).

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C. Gen. Stat. § 15A-1340.12 (2019). “[I]n determining the sentence to be imposed, the trial judge may consider such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant.” *Johnson*, 265 N.C. App. at 87–88, 827 S.E.2d at 141. “Such an inquiry is needed if the imposition of the criminal sanction is to best serve the goals of the substantive criminal law.” *State v. Smith*, 300 N.C. 71, 82, 265 S.E.2d 164, 171 (1980) (finding that the trial judge's questions to the defendant about his prior criminal record was appropriate and that the defendant's failure to object or assert his Fifth Amendment privilege amounted to a waiver on appeal).

¶ 25 “The trial judge may also take into account the seriousness of a particular offense when exercising its discretion to decide the minimum term to impose within the presumptive range.” *Johnson*, 265 N.C. App. at 88, 827 S.E.2d at 141. “While a sentence within the statutory limit will be presumed regular and valid, such a presumption is not conclusive.” *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987). “If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regulari-

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ty is overcome, and the sentence is in violation of defendant's rights." *Id.* "A criminal defendant may not be punished at sentencing for exercising [his] constitutional right to trial by jury." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990); *see also Johnson*, 265 N.C. App. at 88, 827 S.E.2d at 141 ("[O]ur Courts have held it is improper during sentencing for a trial judge to consider a defendant's refusal to accept a plea offer.").

Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because [the] defendant did not agree to a plea offer by the state and insisted on a trial by jury, [the] defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

State v. Tice, 191 N.C. App. 506, 511–12, 664 S.E.2d 368, 372 (2008) (quoting *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990)).

¶ 26 "The trial de novo represents a completely fresh determination of guilt or innocence." *State v. Butts*, 22 N.C. App. 504, 506, 206 S.E.2d 806, 808 (1974) (quoting *Colten v. Kentucky*, 407 U.S. 104, 117 (1972)).

[U]nless it affirmatively appears that a second sentence has been increased to penalize a defendant for exercising rights accorded him by the constitution, a statute, or judicial decision, a longer sentence does not impose an unreasonable condition upon the exercise of those rights nor does it deprive him of due process. The presumption is that the judge has acted with the proper motive and that he has not violated his oath of office.

State v. Stafford, 274 N.C. 519, 531, 164 S.E.2d 371, 380 (1968). "The burden is on the defendant to overcome the presumption that a court acted with proper motivation in imposing a more severe sentence." *State v. Daughtry*, 61 N.C. App. 320, 324, 300 S.E.2d 719, 721 (1983).

¶ 27 As to Defendant's first argument, Defendant's Level Five punishment fit within the statutory limit and is "presumed regular and valid." N.C. Gen. Stat. § 20-179(k) (2019); *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681. Defendant has not overcome the "presumption of regularity" by showing that "the court considered irrelevant and improper matter[s] in determining the severity of the sentence." *Id.*, 360 S.E.2d at 681. The trial judge did reference a chambers conversation where he stated he would give Defendant the same punishment as the district court judge

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if Defendant “want[ed] to accept responsibility and move forward.” However, the judge went on to say the following in the sentencing hearing: “[n]ow, one of the things about at the superior court level, my job is not to punish you because you didn’t take an offer. That’s not what it’s about. My job is to be fair and impartial, as I’m always going to be.” It cannot be reasonably “inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer.” *Tice*, 191 N.C. App. at 511–12, 664 S.E.2d at 372 (citation omitted).

¶ 28

Further, the judge stated:

This was not an accident . . . I saw the video. I heard what the man said. When you hit his car, he went down the embankment. You’re lucky you didn’t kill somebody. See that’s what I think is missing here. You think it’s just an accident . . . it might have appeared like an accident, but you could have killed somebody. That’s no joke. So slight impairment, substance abuse assessment, safe driving record, polite and cooperative, you could have killed that man. He went down an embankment. You could have killed him. You could have killed yourself.

Taking “into account the seriousness of” the impaired driving offense is within the judge’s discretion during sentencing. *Johnson*, 265 N.C. App. at 88, 827 S.E.2d at 141. Defendant has not met his burden to overcome the presumption “that the judge has acted with the proper motive and that he has not violated his oath of office.” *Stafford*, 274 N.C. at 531, 164 S.E.2d at 380.

¶ 29

Defendant’s second argument also fails. Defendant did not assert his Fifth Amendment privilege or object when the judge questioned him about his previous drug use. Defendant had counsel present, but Defendant did not ask to speak with his attorney nor did he conference with counsel. Defendant waived his Fifth Amendment argument for appeal. *Smith*, 300 N.C. at 82, 265 S.E.2d at 171.

III. Conclusion

¶ 30

We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

STATE v. TARLTON

[279 N.C. App. 249, 2021-NCCOA-458]

STATE OF NORTH CAROLINA

v.

JODY ALLEN TARLTON, DEFENDANT

No. COA20-100

Filed 7 September 2021

1. Appeal and Error—preservation of issues—fatal variance between indictment and evidence—motion to dismiss based on sufficiency of evidence

In a drug prosecution, without deciding whether defendant's motion to dismiss for insufficient evidence was adequate to preserve for appellate review his argument that a fatal variance existed between the indictment that charged defendant with resisting a public officer and the evidence presented, the Court of Appeals employed de novo rather than plain error review to resolve the fatal variance issue.

2. Indictment and Information—fatal variance—resisting a public officer—basis for arrest immaterial

In a drug prosecution, there was no fatal variance between the indictment charging defendant with resisting a public officer, which stated defendant was being arrested for processing narcotics, and the evidence at trial, which showed defendant was found to possess marijuana before he ran away from officers, because the specific basis for the arrest was not an essential element of the offense and was therefore immaterial. The evidence identifying the officer's official duty as lawfully trying to take defendant into custody—an essential element—conformed to the allegations in the indictment.

Appeal by defendant from judgment entered 7 August 2019 by Judge Kevin M. Bridges in Superior Court, Union County. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander H. Ward, for the State.

Jarvis John Edgerton, IV, for defendant.

STROUD, Chief Judge.

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¶ 1 Jody Allen Tarlton (“Defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of possession with intent to sell and deliver methamphetamine, possession of heroin, misdemeanor possession of marijuana, possession of drug paraphernalia, resisting a public officer, and attaining habitual felon status. Defendant argues that the trial court erred in denying his motion to dismiss the charge of resisting a public officer because there was a fatal variance between the indictment and the evidence introduced at trial. Because the evidence at trial conformed to the allegations in the indictment as to the essential elements of the crime of resisting a public officer, we conclude there was no error.

I. Background

¶ 2 The State’s evidence tended to show that on 15 May 2018 at approximately 10:00 A.M., Detective David Todd Haigler of the Monroe Police Department received a phone call from a confidential informant. The confidential informant said Defendant—a white male carrying a “blue/black/gray camo in color book bag” and wearing blue jeans and a hat—would be at the Citgo Station on East Roosevelt Boulevard with “a significant amount of methamphetamine in [his] book bag.” Along with Sergeant Nick Brummer and Officer Travis Furr, Detective Haigler drove to the Citgo Station, where he “observed a white male matching the description . . . [who] had in his possession a camo book bag that was also described to [him] by the confidential informant.” For approximately twenty minutes, the officers watched Defendant as he stood outside the store.

¶ 3 When Sergeant Brummer and Detective Haigler got out of their vehicles and approached Defendant, he was “sitting down[;] he had a bag with him[;] and he had a knife on his side.” Sergeant Brummer testified that he asked Defendant “if he had anything on him that [the officers] needed to know about and [Defendant] said just a little bud in his pocket.” After asking Defendant to turn around and place his hands on the wall, Detective Haigler retrieved marijuana from Defendant’s pocket. At that point, Officer Furr testified that he “grabbed the camouflage bag that was laying in between [Defendant’s] feet on the ground” and carried it to Detective Haigler’s vehicle.

¶ 4 After taking Defendant’s knife, Sergeant Brummer asked Defendant if he could search his book bag. Defendant explained that “he got the book bag from a male subject in the parking lot” and pointed toward the parking lot. Detective Haigler testified that when he looked in the direction that Defendant was pointing, Defendant “took off running.” Upon hearing Sergeant Brummer yell “get him,” Officer Furr left

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Defendant's book bag on the police vehicle and joined Detective Haigler and Sergeant Brummer's foot pursuit of Defendant. They apprehended Defendant within one minute.

¶ 5 At trial, Defendant stipulated that his book bag contained 11.49 grams of methamphetamine and less than .1 grams of heroin. At the close of the State's evidence, Defendant moved to dismiss and "grant acquittals to [Defendant] on all the charges with which he's currently related, recognizing the State has dismissed two of those from the very start." The trial court denied the motion. Defendant renewed his motion to dismiss the charges at the close of all the evidence, and the trial court again denied the motion. The jury returned verdicts finding Defendant guilty of all charges. Defendant was sentenced to two consecutive judgments and commitments for a total minimum of 178 months and a total maximum of 238 months imprisonment. Defendant appeals.

II. Analysis

¶ 6 Defendant argues that "the trial court erred when it denied Defendant's motion to dismiss the charge for resisting a public officer because there was a fatal variance between the indictment allegation and the evidence." (Original in all caps.)

A. Preservation

¶ 7 **[1]** The State argues that Defendant did not preserve his fatal variance argument for appellate review because "[t]his Court has repeatedly held that in order to preserve a fatal variance argument for appellate review, a defendant must specifically state at trial that a fatal variance is the basis for his motion to dismiss." Defendant, citing *State v. Smith*, 375 N.C. 224, 846 S.E.2d 492 (2020), asserts that his "fatal variance argument here is preserved for normal appellate review upon his timely motions to dismiss all charges."

¶ 8 In *State v. Smith*, 375 N.C. 224, 846 S.E.2d 492, the defendant was charged with two counts of engaging in sexual activity with a student in violation of North Carolina General Statute § 14-27.7. *Id.* at 226, 846 S.E.2d at 493. At trial, the defendant moved to dismiss the charge based on insufficient evidence of one element of the crime—whether sexual activity occurred—and the trial court denied the motion. *Id.* at 226–27, 846 S.E.2d at 493. In his appeal to this Court, the defendant argued the trial court erred in denying his motion to dismiss because (1) "the evidence at trial did not establish that he was a 'teacher' within the meaning of N.C.G.S. § 14-27.7(b)" or, in the alternative, (2) "there was a fatal variance between the indictment and proof at trial since the indictment

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alleged defendant was a ‘teacher,’ but his status as a substitute teacher made him ‘school personnel’ under section 14-27.7(b).” *Id.* at 227–28, 846 S.E.2d at 494. This Court held that the defendant failed to preserve these arguments for appellate review because the insufficient evidence argument at trial was limited to a single element of the crime, and the fatal variance argument was not presented to the trial court. *Id.* at 228, 846 S.E.2d at 494.

¶ 9 On appeal, the Supreme Court acknowledged this Court’s opinion was filed before the Supreme Court’s opinion in *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020), which “addressed the specific issue of when a motion to dismiss preserves all sufficiency of the evidence issues for appellate review.” *Id.* at 228–29, 846 S.E.2d at 494. In *Golder*, the Supreme Court “held that ‘Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time.’” *Id.* at 229, 846 S.E.2d at 494 (quoting *Golder*, 374 N.C. at 246, 839 S.E.2d at 788). Based on its holding in *Golder*, the Court in *Smith* explained, “[b]ecause defendant here made a general motion to dismiss at the appropriate time and renewed that motion to dismiss at the close of all the evidence, his motion properly preserved all sufficiency of the evidence issues.” *Id.* at 229, 846 S.E.2d at 494. The Supreme Court did not conclusively determine whether the defendant’s fatal variance argument was preserved for appellate review; the Court stated, “assuming without deciding that defendant’s fatal variance argument was preserved, defendant’s argument would not prevail for the same reasoning.” *Id.* at 231, 846 S.E.2d at 496.

¶ 10 Following *Golder* and *Smith*, this Court recently addressed whether a fatal variance argument was preserved for appellate review:

Although *Golder* did not address this specific question, our Court has noted, in light of *Golder*: “any fatal variance argument is, essentially, an argument regarding the sufficiency of the State’s evidence.” We further reasoned: “our Supreme Court made clear in *Golder* that ‘moving to dismiss at the proper time . . . preserves all issues related to the sufficiency of the evidence for appellate review.’” Specifically, in *Gettleman* we determined the defendant failed to preserve an argument that the jury instructions and indictment in that case created a fatal variance precisely because the Defendant failed to move to dismiss the charge in question. Here, unlike in *Gettleman*, Defendant did timely move to dismiss all

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charges, and thus, under the rationale of *Gettleman*, it would appear Defendant did preserve this argument. Without so deciding, and for purposes of review of this case, we employ de novo review.

State v. Brantley-Phillips, 278 N.C. App. 279, No. 2021-NCCOA-307, ¶ 22 (citations and brackets omitted) (quoting *State v. Gettleman*, 275 N.C. App. 260, 271, 853, S.E.2d 447, 454 (2020)).

¶ 11 Here, Defendant moved to dismiss his charges at the close of the State's evidence and renewed the motion at the close of all the evidence. Therefore, as in *Brantley-Phillips*, "it would appear Defendant did preserve this argument" but, "[w]ithout so deciding, and for purposes of review of this case, we employ de novo review." *Id.*

B. Fatal Variance

¶ 12 [2] Defendant argues there was a fatal variance between the indictment charging him with resisting a public officer and the evidence presented at trial. Specifically, the indictment alleged that at the time of Defendant's resistance, Detective Haigler was "attempting to take the defendant into custody for processing narcotics" but the evidence at trial "only showed that Defendant ran from officers, including Haigler, after a small amount of marijuana was seized from his person." Defendant asserts he "is entitled to have his resisting conviction vacated because the State tendered no evidence supporting its material indictment allegation that Defendant resisted an arrest for processing narcotics."

A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.

In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to the gist of the offense.

State v. Pickens, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citations, quotation marks, and brackets omitted). "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted).

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The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) [e]nsuring that the defendant is able to prepare his defense against the crime with which he is charged and (2) protecting the defendant from another prosecution for the same incident. However, *a variance does not require reversal unless the defendant is prejudiced as a result.*

State v. Glidewell, 255 N.C. App. 110, 113, 804 S.E.2d 228, 232 (2017) (emphasis added) (citations, quotation marks, brackets, and ellipses omitted).

¶ 13 Defendant was charged with resisting, delaying, or obstructing a public officer under North Carolina General Statute § 14-223, which makes it a misdemeanor to “willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office[.]” N.C. Gen. Stat. § 14-223 (2019). “[O]ur Supreme Court has determined a warrant or bill of indictment must identify the officer—the person alleged to have been resisted, delayed or obstructed—by name; *indicate the official duty he was discharging or attempting to discharge*; and should point out, generally, the manner in which the defendant is charged with having resisted, delayed, or obstructed the officer.” *State v. Nickens*, 262 N.C. App. 353, 360, 821 S.E.2d 864, 871 (2018) (emphasis added) (citations omitted). Here, the indictment for resisting a public officer alleged that Defendant “unlawfully and willfully did”:

resist, delay and obstruct Detective D. Haigler, a public officer holding the office of Monroe Police Department, by fleeing on foot to avoid arrest. At the time, the officer was discharging and attempting to discharge a duty of his office, attempting to take the defendant into custody for processing narcotics.

¶ 14 According to Defendant, the “basis for the arrest, as alleged in the indictment, is a material element of the charge[.]” and, therefore, any variance in the basis for the arrest between the evidence at trial and the allegation in the indictment would be material and fatal. However, Defendant does not cite, and our research has not revealed, *any* case that holds the specific basis for arrest is an essential element of the charge of resisting a public officer. It is well-established that an essential element of the charge of resisting a public officer is the identification of the official duty an officer was discharging or attempting to discharge at the time of a defendant’s resistance. *See id.*; *State v. Swift*, 105 N.C.

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App. 550, 553, 414 S.E.2d 65, 67 (1992). Indeed, this Court has explained that “[i]n the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and *the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant’s defense*[.]” *State v. Kirby*, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325 (1972) (third emphasis added).

¶ 15 Here, the indictment alleged that at the time of Defendant’s resistance, Detective Haigler was engaged in the duty of “attempting to take the defendant into custody for processing narcotics.” The identification of Detective Haigler’s official duty—attempting to take Defendant into custody—is an essential element of resisting a public officer. *See Nickens*, 262 N.C. App. at 360, 821 S.E.2d at 871; *Kirby*, 15 N.C. App. at 488, 190 S.E.2d at 325. At trial, law enforcement officers testified that before his arrest, Defendant admitted to having “just a little bud in his pocket,” which the officers subsequently retrieved. Defendant does not contend that the officers acted unlawfully in attempting to take him into custody or that his arrest was unlawful. The State presented evidence that Defendant’s arrest was lawful, as Detective Haigler had probable cause to arrest Defendant for possession of marijuana when Defendant started to run away. Therefore, the allegation in the indictment which identified Detective Haigler’s official duty as attempting to take Defendant into custody conformed to the evidence actually presented at trial.

¶ 16 This Court has explained:

The bill is complete without evidentiary matters descriptive of the manner and means by which the offense was committed. A verdict of guilty, or not guilty, is only as to the offense charged, not of surplus or evidential matters alleged. *An averment in an indictment or warrant not necessary in charging the offense may be treated as exceeding what is requisite and should be disregarded.* We find it unnecessary to pass upon the effect of the evidential matters charged, therefore. *The evidence corresponded with the allegations of the indictment which were essential and material to charge the offense.* The judge in turn did an adequate job of clarifying the issues, and of eliminating extraneous matters, as was his duty.

State v. Lewis, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982) (emphasis added) (citations and quotation marks committed). Here,

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the specific basis for Defendant's arrest was "[a]n averment . . . exceeding what is requisite and should be disregarded." *Id.* It is immaterial whether the arrest was based on processing narcotics or possession of marijuana because the State's evidence demonstrated that at the time of Defendant's resistance, Detective Haigler was *lawfully* attempting to arrest Defendant. Defendant does not argue that his arrest was not lawful because there was no probable cause to arrest him for possession of marijuana. The fact that the evidence at trial did not show that Detective Haigler arrested Defendant for the specific basis of processing narcotics did not hinder Defendant from preparing a defense nor did it leave him vulnerable to the same charges being brought against him. Defendant also does not argue that he was prejudiced because the evidence at trial tended to show that he was arrested for possession of marijuana. During the charge conference, Defendant asked the trial court to change the jury instruction for resisting a public officer to reflect that the official duty "was attempting to take the Defendant into custody for possessing controlled substances, to wit, marijuana, which is a duty of a detective." Defendant rejected the court's proposal to instruct the jury that Defendant was taken into custody for "possessing a controlled substance" and specifically requested the court "put marijuana in" the instruction because "that's consistent with the testimony of both officers."

¶ 17 Defendant asserts this case "is analogous" to *State v. Carter*, 237 N.C. App. 274, 765 S.E.2d 56 (2014). In *Carter*, after a confidential source made a controlled purchase of drugs at the defendant's house, deputies obtained a search warrant for the defendant's person and house. *Id.* at 276, 765 S.E.2d at 59. On the way to the defendant's house to execute the search warrant, a deputy observed the defendant in the passenger seat of a passing car and initiated a stop. *Id.* The deputy approached the passenger side of the car, informed the defendant he was the named subject of the search warrant, and ordered the defendant to step out of the car and submit to a search. *Id.* at 276–77, 765 S.E.2d at 59. When the defendant refused to exit the car, the deputy radioed for backup and informed the defendant he was under arrest. *Id.* at 277, 765 S.E.2d at 59. The defendant was subsequently charged and convicted of resisting a public officer and appealed. *Id.* at 277, 765 S.E.2d at 59.

¶ 18 On appeal, the defendant argued that the trial court erred in denying his motion to dismiss the charge of resisting a public officer because there was insufficient evidence that the deputy was discharging or attempting to discharge a duty of his office—executing a search warrant—in a lawful manner at the time the defendant resisted. *Id.* at 276, 765

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S.E.2d at 58. This Court agreed with the defendant, held that the deputy violated North Carolina General Statute § 15A-252 (providing the statutory requirements for an officer intending to execute a search warrant), and “[c]onsequently, [the deputy] was not lawfully executing the warrant, and [the] defendant had a right to resist him.” *Id.* at 280, 765 S.E.2d at 61. Explaining “[t]he basis for the charge of resisting a public officer was defendant’s refusal to get out of the car and submit to a search of his person[,]” this Court held that “the legality of the stop has no bearing on the legality of Investigator Burns’ conduct in executing the search warrant.” *Id.*

¶ 19 Defendant asserts “[i]n the instant case, just as in *Carter*, the State’s evidence is insufficient to show Defendant violated the particular offense the State alleged in its indictment.” However, *Carter* is inapposite, and Defendant’s characterization is misleading. First, there was no fatal variance or other indictment issue raised in *Carter*. The term “indictment” is not referenced at all in the *Carter* decision. In *Carter*, we addressed the sufficiency of the evidence pertaining to the lawfulness of the official duty being performed—the execution of the search warrant—which is an essential element of the crime of resisting a public officer. Here, however, Defendant does not challenge the sufficiency of the evidence regarding the legality of the official duty being performed—attempting to take the defendant into custody—but instead argues there was insufficient evidence he was arrested *for processing narcotics*. However, as discussed above, the basis of the arrest is “an averment unnecessary to charge the offense,” which “may be disregarded as inconsequential surplusage.” *State v. Grady*, 136 N.C. App. 394, 396–97, 524 S.E.2d 75, 77 (2000). As a result, there was no fatal variance between the indictment and the evidence presented, as “[t]he evidence corresponded with the allegations of the indictment which were essential and material to charge the offense.” *Lewis*, 58 N.C. App. at 354, 293 S.E.2d at 642.

III. Conclusion

¶ 20 We hold that the evidence at trial conformed to the allegations in the indictment as to the essential elements of the crime of resisting a public officer.

NO ERROR.

Judges ARROWOOD and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 SEPTEMBER 2021)

BARRIER v. CITY OF KANNAPOLIS 2021-NCCOA-459 No. 20-592	N.C. Industrial Commission (17-807422)	Affirmed in Part, Remanded in Part.
EPES LOGISTICS SERVS., INC. v. MARCUSLUND 2021-NCCOA-460 No. 20-338	Guilford (19CVS8889)	Affirmed
IN RE A.P. 2021-NCCOA-461 No. 21-36	Orange (19JA25)	Affirmed
IN RE D.R. 2021-NCCOA-462 No. 21-148	Moore (20JA63)	Affirmed
IN RE H.M. 2021-NCCOA-463 No. 21-173	Mecklenburg (20JA237-239)	Affirmed
IN RE J.A.H. 2021-NCCOA-464 No. 20-600	Iredell (19JB53)	Affirmed
IN RE L.T.B. 2021-NCCOA-465 No. 21-124	Pitt (16JB188)	Affirmed In Part; Vacated In Part And Remanded.
IN RE R.W. 2021-NCCOA-466 No. 21-107	Alamance (19JA112) (19JA113)	Affirmed
McCARTER v. N.C. BD. OF LICENSED PRO. COUNS. 2021-NCCOA-467 No. 20-584	Gaston (19CVS535)	REVERSED AND REMANDED WITH INSTRUCTIONS
SMITH v. NOVANT HEALTH, INC. 2021-NCCOA-468 No. 19-859	Forsyth (16CVS5181) (16CVS5182)	Affirmed in Part, Remanded in Part

STATE v. ALLAMADANI 2021-NCCOA-469 No. 20-752	Guilford (17CRS67374) (18CRS66199) (18CRS66622) (18CRS81632) (18CRS81636) (19CRS25443) (19CRS25584) (19CRS25591-95) (19CRS66455) (19CRS70510) (19CRS71794) (19CRS79925) (19CRS81545)	Vacated and Remanded
STATE v. ALLEN 2021-NCCOA-470 No. 20-468	Avery (18CRS306) (18CRS50212-15) (18CRS50230)	Vacated and Remanded
STATE v. BECKWITH 2021-NCCOA-471 No. 20-437	Beaufort (17CRS50395-400)	No Error
STATE v. CHAMBERLIN 2021-NCCOA-472 No. 20-651	Lee (18CRS50509)	No Error.
STATE v. DAVIS 2021-NCCOA-473 No. 20-445	New Hanover (18CRS51367)	No Error
STATE v. DILLARD 2021-NCCOA-474 No. 20-602	Forsyth (18CRS57884) (18CRS58396-97)	No error; dismissed in part.
STATE v. HERNANDEZ 2021-NCCOA-475 No. 20-583	Lincoln (18CRS51953) (18CRS51954) (18CRS51959)	NO PLAIN ERROR; REMANDED TO CORRECT CLERICAL ERROR
STATE v. HERR 2021-NCCOA-476 No. 20-723	Rockingham (11CRS52900) (11CRS52904) (14CRS51578)	Affirmed
STATE v. JOYNER 2021-NCCOA-477 No. 20-156	Iredell (13CRS52197-98) (19CRS42)	No Error

STATE v. McKOY 2021-NCCOA-478 No. 20-627	Duplin (18CRS50621-22)	No Error
STATE v. MOORE 2021-NCCOA-479 No. 20-416	Gaston (15CRS52842-43)	Affirmed
STATE v. NIVENS 2021-NCCOA-480 No. 20-344	Cabarrus (18CRS54382-84)	Reversed and Remanded in part; No Error in part.
STATE v. PETERSON 2021-NCCOA-481 No. 20-571	Pender (17CRS51309)	No Error
STATE v. SCHMIDT 2021-NCCOA-482 No. 20-661	Randolph (18CRS52687)	VACATED IN PART; NO ERROR IN PART
STATE v. SHUFORD 2021-NCCOA-483 No. 20-744	Catawba (18CRS55537) (18CRS55539) (19CRS435)	No Error In Part; Vacated In Part And Remanded For Resentencing.
WELLER v. JACKSON 2021-NCCOA-484 No. 21-80	Onslow (20CVD1371)	Reversed
ZIMMERMAN v. ZIMMERMAN 2021-NCCOA-485 No. 20-785	Randolph (17CVD2295)	Affirmed in part, Vacated in part and Remanded

**AETNA BETTER HEALTH OF N.C., INC. v. N.C. DEP'T OF
HEALTH & HUM. SERVS.**

[279 N.C. App. 261, 2021-NCCOA-486]

AETNA BETTER HEALTH OF NORTH CAROLINA, INC., PETITIONER

NORTH CAROLINA PROVIDER OWNED PLANS, INC., D/B/A
MY HEALTH BY HEALTH PROVIDERS, INTERVENOR

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

AND

WELLCARE OF NORTH CAROLINA, INC., BLUE CROSS AND BLUE SHIELD
OF NORTH CAROLINA, AMERIHEALTH CARITAS NORTH CAROLINA, INC.,
UNITEDHEALTHCARE OF NORTH CAROLINA, INC., AND
CAROLINA COMPLETE HEALTH, INC., RESPONDENTS-INTERVENORS

No. COA21-97

Filed 21 September 2021

**1. Administrative Law—judicial review—service requirement—
mandated by statute—subject matter jurisdiction**

Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable decision to the superior court, the superior court did not err by dismissing Aetna's petition for judicial review for lack of subject matter jurisdiction. Aetna's failure to timely serve DHHS and the other parties within the 10 days after the petition was filed, as required by N.C.G.S. § 150B-46, warranted dismissal, and Aetna's filing of an amended petition for judicial review could not circumvent the mandatory 10-day service requirement.

**2. Administrative Law—judicial review—service of petition—
motion for extension of time—good cause**

Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable decision to the superior court, the superior court did not abuse its discretion by denying Aetna's motion for an extension of time to serve its petition for judicial review upon DHHS and the other parties after Aetna had failed to perform service within the mandatory 10-day period following the filing of its petition (pursuant to N.C.G.S. § 150B-46). The superior court's good-cause evaluation was supported by reason and was not arbitrary.

**AETNA BETTER HEALTH OF N.C., INC. v. N.C. DEP'T OF
HEALTH & HUM. SERVS.**

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Appeal by petitioner from order entered 18 November 2020 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 26 May 2021.

Hedrick Gardner Kincheloe & Garofalo LLP, by Patricia P. Shields, Linda Stephens, M. Duane Jones, and Tatiana M. Terry; Hunton Andrews Kurth LLP by Nash Long and Kevin J. Cosgrove; Hahn Loeser & Parks LLP by Marc J. Kessler and E. Sean Medina, for Petitioner-Appellant Aetna Better Health of North Carolina, Inc.

Haynsworth Sinkler Boyd, P.A., by Robert Y. Knowlton, Elizabeth H. Black, Boyd B. Nicholson, Jr.; and Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, and Special Deputy Attorney General John R. Green, Jr. for Respondent-Appellee North Carolina Department of Health and Human Services.

Alexander Ricks PLLC, by Rodney E. Alexander and Mary K. Mandeville, and Mayer Brown, LLP, by Rodger V. Abbot, Luke Levasseur, and Marcia G. Madesen, for Respondent-Intervenor-Appellee AmeriHealth Caritas of North Carolina, Inc.

Brooks, Pierce, McLendon, Humphry & Leonard, LLP, by Jennifer K. Van Zant, Jessica Thaller-Moran, and Eric F. Fletcher, for Respondent-Intervenor-Appellee Blue Cross and Blue Shield of North Carolina.

Wyrick Robbins Yates & Ponton, LLP, by Lee M. Whitman, Paul J. Puryear, Jr., for Respondent-Intervenor-Appellee Carolina Complete Health, Inc.

Alston & Bird LLP, by Jessica L. Sharron; and Tharrington Smith LLP, by F. Hill Allen and Colin Shive, for Respondent-Intervenor-Appellee UnitedHealthcare of North Carolina, Inc.

Morningstar Law Group, by Shannon R. Joseph; and Holland & Knight, by Karen D. Walker, for Respondent-Intervenor-Appellee Wellcare of North Carolina, Inc.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, Robert A. Leandro, and Melanie Black Dubis, for Respondent-Intervenor-

**AETNA BETTER HEALTH OF N.C., INC. v. N.C. DEP'T OF
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Appellee North Carolina Provider Owned Plans, Inc. d/b/a My Health by Health Providers.

TYSON, Judge.

¶ 1 Aetna Better Health of North Carolina, Inc. (“Aetna”) appeals from an order entered dismissing their petition for lack of subject matter jurisdiction and denying their motion for an extension of time for service of process. We affirm.

I. Background

¶ 2 The North Carolina Department of Health and Human Services (“DHHS”) is responsible for overseeing and operating North Carolina’s Medicaid plan. DHHS is transitioning North Carolina’s Medicaid delivery system from a fee-for-service model to a managed care model operated by Prepaid Health Plans, pursuant to North Carolina’s Medicaid Transformation Act. S.L. 2015-245; *see* N.C. Gen. Stat. § 122C-115(e) (2019). This Act directed DHHS to develop a request for proposals to award prepaid health contracts. S.L. 2015-245, § 4. In 2018, DHHS formed an evaluation committee (“Committee”) to review and score proposals.

¶ 3 Aetna is a managed-care provider, one of eight entities who submitted proposals for Medicaid managed-care services. The Committee issued its recommendations on 24 January 2019, which identified four statewide contracts for Medicaid managed care services to be awarded. On 4 February 2019, DHHS awarded contracts to WellCare of North Carolina, Inc. (“Wellcare”), Blue Cross and Blue Shield of North Carolina (“BCBS”), AmeriHealth Caritas of North Carolina (“AmeriHealth”), and UnitedHealthcare of North Carolina, Inc. (“United Healthcare”). DHHS also awarded a regional contract to Carolina Complete Health, Inc. (“CCH”) (collectively “Intervenors”).

¶ 4 Aetna, along with the two other entities who were not awarded contracts, protested DHHS’ contract and award decisions by filing contested case petitions in the Office of Administrative Hearings (“OAH”). Aetna filed its contested case petition and motion for preliminary injunction on 16 April 2019. The Administrative Law Judge (“ALJ”) denied Aetna’s motion for preliminary injunction on 26 June 2019. The ALJ consolidated all three petitions on 26 July 2019.

¶ 5 The ALJ entered an order on 9 September 2020 granting DHHS’ motion for summary judgment of all claims. The decision included a “notice of appeal,” paragraph which provides:

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[u]nder the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** . . . N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all Parties.

¶ 6 Aetna timely filed its Petition for Judicial Review in superior court on 23 September 2020. The remaining companies not receiving an offer also filed a Petition for Judicial Review. Aetna served its Petition on counsel of record in the proceedings. Aetna filed a notice of Petition with the OAH, which transmitted notice to all counsel of record.

¶ 7 Aetna failed to serve a copy of its Petition on DHHS' designated service of process agent, Lisa Granberry Corbett or any member of her office as required, pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(4) (2019). On 8 October 2020, Intervenors and DHHS filed motions to dismiss and served them on Aetna the same day. On 12 October 2020 at 9:00 a.m., Aetna personally served Corbett. At 10:18 a.m. the same day, Aetna filed an amended Petition for Judicial Review and personally served Corbett at 10:30 a.m.

¶ 8 On 13 October 2020, Aetna moved for an extension of time to serve its Petition for Judicial Review and served the amended Petition for Judicial Review on Intervenors' counsel. The superior court heard the motions to dismiss on 9 November 2020, denied Aetna's request for an extension of time for service of process, and granted DHHS' and Intervenors' motions to dismiss for lack of jurisdiction by order entered 23 November 2020. Aetna appeals.

II. Jurisdiction

¶ 9 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 10 Aetna raises four arguments in their brief. We consolidate and restructure their arguments as follows, whether the superior court erred by: (1) granting DHHS' and Intervenors' motion to dismiss; and, (2) denying Aetna's motion to extend the time for service.

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IV. Motion to Dismiss

¶ 11 **[1]** Aetna argues the superior court erred by granting DHHS’ and Intervenor’s motion to dismiss.

A. Standard of Review

¶ 12 “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Analysis

1. Controlling Statutes

¶ 13 Our Supreme Court has held: “No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute.” *Empire Power Co. v. N.C. Dep’t of Env’t, Health & Nat. Res.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994) (citations omitted).

¶ 14 “[B]ecause the right to appeal to an administrative agency is granted [only] by statute, compliance with statutory provisions is necessary to sustain the appeal.” *Gummels v. N.C. Dep’t of Human Resources*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990) (citation omitted). Aetna has the right to appeal pursuant to N.C. Gen. Stat. § 150B-43 (2019).

¶ 15 N.C. Gen. Stat. § 150B-45(a) articulates the filing requirement for judicial review in the superior court: “the person seeking review *must file a petition within 30 days* after the person is served with a written copy of the decision. . . in the county where the contested case which resulted in the final decision was filed.” N.C. Gen. Stat. § 150B-45(a) (2019) (emphasis supplied). N.C. Gen. Stat. § 150B-46 provides the mandatory service requirement: “Within 10 days after the petition is filed with the court, the party seeking the review *shall serve copies of the petition* by personal service or by certified mail *upon all who were parties of record* to the administrative proceedings.” N.C. Gen. Stat. § 150B-46 (2019) (emphasis supplied).

¶ 16 Here, Aetna failed to timely serve DHHS or any other party within the “10 days after the petition is filed” as is mandated by N.C. Gen. Stat. § 150B-46. Prior to serving DHHS, Aetna amended its Petition on 12 October 2020 and served its amended Petition the same day. Aetna

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argues “the relation-back provision of Rule 15(c) allows the service of an amended pleading where the original pleading was not properly served.”

2. *Rone v. Winston-Salem/Forsyth Cnty Bd. of Educ.*

¶ 17 Aetna cites *Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 207 N.C. App. 624, 701 S.E.2d 284, 289 (2010) for the proposition Rule 15 allows a petition to be amended. *Rone* is not controlling as the pleading therein was *amended after service was timely completed* pursuant to N.C. Gen. Stat. § 150B-46. *Id.*

¶ 18 To allow Rule 15 to control timeliness of service, when a party did not complete service pursuant to N.C. Gen. § 150B-46, would contravene our prior precedents and the legislative intent, and could lead to gamesmanship to overcome dilatory lapses. N.C. Gen. Stat. § 150B-46; *Gummels*, 98 N.C. App. at 677, 392 S.E.2d at 114. Rule 15 applies “to all proceedings in superior court *except when a differing procedure is prescribed by statute.*” N.C. Gen. Stat. §1A-1, Rule 1 (2019) (emphasis supplied).

3. *Statutory Construction*

¶ 19 In determining the application of N.C. Gen. Stat. § 150B-46 of the Administrative Procedures Act and Rule 15 of the Rules of Civil Procedure, we are guided by several principles of statutory construction. “The principal goal of statutory construction is to accomplish the legislative intent.” *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). “The best indicia of that intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish.” *Coastal Ready-Mix Concrete Co. v. Bd. of Comm’rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

¶ 20 “When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]” *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). “Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.” *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (alteration, citation and internal quotation marks omitted). “Statutes *in pari materia* must be read in context with each other.” *Cedar Creek Enters. v. Dep’t of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976).

¶ 21 Further, “where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the

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law shall control[.]” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations omitted).

¶ 22 Aetna’s arguments would effectively nullify N.C. Gen. Stat. § 150B-46. Aetna’s amended Petition for Judicial Review did not assert additional or amend any causes of action. It was “amended” merely in an attempt to avoid the strict application of N.C. Gen. Stat. § 150B-46. Aetna’s argument is overruled.

V. Motion for Extension of Time for Service

¶ 23 **[2]** Aetna argues the trial court abused its discretion in denying its motion for an extension to serve the petition.

A. Standard of Review

¶ 24 The determination of whether good cause exists to extend the time for service rests within the sound discretion of the superior court. *N.C. Dep’t of Pub. Safety v. Owens*, 245 N.C. App. 230, 232-233, 782 S.E.2d 337, 339 (2016). When we review for an abuse of discretion, this Court cannot reverse the trial court’s decision unless the appellant shows the decision was “manifestly unsupported by reason” or was “so arbitrary that it could not have been the result of a reasoned decision.” *Atkins v. Mortenson*, 183 N.C. App. 625, 628, 644 S.E.2d 625, 628 (2007) (citation omitted).

B. Analysis

¶ 25 “[U]nlike [N.C. Gen. Stat.] § 150B-45 which allows the superior court [discretion] to grant additional time for the *filing* of the petition, there is no express provision in G.S. 150B-46 which authorizes the superior court to extend the time for *serving* the petition.” *Owens*, 245 N.C. App. at 233, 782 S.E.2d at 339 (emphasis supplied). Nevertheless, to avoid a potential “harsh result” arising from the timely filing but untimely service of a Petition, this Court has held “the superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided for under G.S. 150B-46.” *Id.* at 234, 782 S.E.2d at 340.

¶ 26 Here, the superior court’s good cause evaluation was supported by reason and was not arbitrary. The trial court’s order contains a lengthy analysis of good cause. Aetna argued the parties had an agreement to serve each other through counsel by email, the opposing parties had misled Aetna and had “unclean hands,” and “sought to engineer a situation in which Aetna’s petition would be dismissed for this minor service defect.”

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¶ 27 The superior court did not find these assertions credible. The superior court acknowledged Aetna claimed, “it did not accomplish proper service because of an alleged ‘agreement’ for all pleadings [to be served] upon counsel *via* email upon filing.” The superior court explicitly rejected these assertions and found, “there was no such agreement” and “with respect to this judicial review proceeding in particular, there was no evidence or argument that the Department or any other party agreed to waive the statutory service requirements necessary to vest jurisdiction in the superior court for a petition for judicial review.”

¶ 28 The superior court clearly determined Aetna had accused the opposing parties of procedural gamesmanship, rather than acknowledging a procedural mistake during service and asking the court to excuse that mistake “for good cause shown.” *Id.* at 232, 782 S.E.2d at 339. The court concluded, although little evidence showed that the untimely service had caused any prejudice for the other parties, Aetna had not demonstrated good cause for the court to extend the otherwise mandatory deadline. *Id.*

¶ 29 When “the trial court acts within its discretion, this Court may not substitute its own judgment for that of the trial court.” *Gunter v. Maher*, 264 N.C. App. 344, 347, 826 S.E.2d 557, 560 (2019). The trial court’s decision was not arbitrary. It was a reasoned decision rendered after careful evaluation of the parties’ competing positions. In particular, Aetna failed to simply “own up” to a critical mistake in perfecting mandatory service of its Petition for Judicial Review on opposing parties. Aetna has shown no abuse of discretion in the superior court’s good cause determination. *Id.* Aetna’s argument is overruled.

VI. Conclusion

¶ 30 For seventy years, our Supreme Court has held: “There can be no appeal from the decision of an administrative agency except pursuant to specific statutory provision therefor. Obviously then, the *appeal must conform to the statute granting the right* and regulating the procedure.” *In re State ex. rel. Emp’t Sec. Comm’n*, 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951) (citations and internal quotation marks omitted) (emphasis supplied).

¶ 31 Our Supreme Court has further held: “The statutory requirements are *mandatory and not directory*. They are conditions precedent to obtaining a review by the courts and [which] must be observed. *Noncompliance therewith requires dismissal*.” *Id.* (emphasis supplied) (citations and internal quotation marks omitted).

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¶ 32 “[T]he service requirements are jurisdictional, and the superior court did not err in dismissing the petition where [a party] . . . was not properly served.” *Isenberg v. N.C. DOC*, 241 N.C. App. 68, 73, 772 S.E.2d 97, 100 (2015). The superior court did not err in granting DHHS’ motion to dismiss nor abuse its discretion in denying Aetna’s motion to extend the time for service of process “for good cause.” The superior court’s order is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and WOOD concur.

NICOLE J. BLANCHARD, PLAINTIFF

v.

DAVID M. BLANCHARD, DEFENDANT

No. COA20-165

Filed 21 September 2021

Attorney Fees—subject matter jurisdiction—fees awarded after appeal of underlying matter—child custody proceeding—award not dependent upon outcome

After finding a father in civil contempt for violating a child custody order, the trial court retained jurisdiction to award attorney fees pursuant to N.C.G.S. § 50-13.6 to the mother—even after the father’s appeal of the contempt order had been filed and perfected—because the attorney fees award was not dependent upon the outcome of the contempt proceeding, as the award was based on the statutory findings that the mother was an interested party who acted in good faith and lacked sufficient means to defray the costs of litigation.

Appeal by defendant from order entered 20 August 2019 by Judge Paige B. McThenia in District Court, Mecklenburg County. Heard in the Court of Appeals 26 January 2021.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit and Haley E. White, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

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STROUD, Chief Judge.

I. Procedural and Factual Background

¶ 1 More detailed facts of this case can be found in this Court’s opinion in COA19-866, *Blanchard v. Blanchard*, filed concurrently with this opinion. We will repeat some of the background when relevant to this opinion. David M. Blanchard (“Father”) and Nicole J. Blanchard (“Mother”) were married and had three children. Father and Mother separated on 2 March 2015, and Mother filed a complaint including a claim for custody of the children on 5 March 2015. A consent order resolving custody issues was entered on 6 November 2015 (the “Custody Order”), but Mother alleged that Father was not complying with certain provisions of the Custody Order, and she filed a “Motion for Contempt” (the “Contempt Motion”) on 3 January 2019. Mother’s Contempt Motion also requested an award of attorney’s fees. The trial court found Father to be in violation of the Custody Order by an order for civil contempt entered 2 April 2019 (the “Contempt Order”). The Contempt Order reserved the issue of attorney’s fees to be heard at a later date. Father filed a notice of appeal from the Contempt Order on 10 April 2019, which was later perfected—that appeal is COA19-866, which we resolve and file concurrently with this opinion.

¶ 2 On 17 June 2019, the trial court held a hearing on the issue of attorney’s fees. Father argued that his appeal in COA19-866 had divested the trial court of jurisdiction to hear the matter. After reviewing briefs on this issue from both parties, the trial court determined it was not divested of jurisdiction to rule on the request for attorney’s fees. By order entered 20 August 2019 (the “Fee Order”), the trial court ordered Father to pay reasonable attorney’s fees Mother had incurred as a result of the contempt action. Father appealed the Fee Order by filing a notice of appeal on 25 September 2019.

II. Analysis

¶ 3 In Father’s sole argument, he contends his 10 April 2019 appeal from the Custody Order, COA19-866, divested the trial court of jurisdiction to consider the issue of attorney’s fees during the pendency of the appeal in COA19-866. Father further contends that because the trial court lacked jurisdiction to enter the Fee Order, the Fee Order is void and must be vacated. We disagree.

¶ 4 Father frames the issue before us as follows:

The question presented by this appeal is whether during the pendency of an appeal of a civil contempt

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order in a custody case the trial court is divested of jurisdiction to hear an N.C. Gen. Stat. § 50-13.6 (2017) attorney fee claim for time spent litigating the custody contempt matter.

Father therefore acknowledges that the attorney's fees were granted to Mother under N.C. Gen. Stat. § 50-13.6.

¶ 5 Father primarily argues that a holding in *Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011), compels this Court to vacate the Fee Order as void for lack of subject matter jurisdiction. Mother contends that *Balawejder* was decided contrary to the prior established precedent of our appellate courts and, therefore, does not control on the issue before us. Father agrees that if two opinions are directly conflicting on an issue, the earlier opinion controls and, as to the relevant issue, the reasoning and holdings of the later opinion would be a nullity.

¶ 6 Both parties cite *Huml v. Huml*, 264 N.C. App. 376, 826 S.E.2d 532 (2019), acknowledging “that if there is a conflicting line of cases, this Court” is “bound to follow” “the older of the two cases.” In *Huml*, this Court held:

Where there is a conflict in cases issued by this Court addressing an issue, we are bound to follow the “earliest relevant opinion” to resolve the conflict:

Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court. Further, our Supreme Court has clarified that, where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines. With that in mind, we find *Skipper* and *Vaughn* are irreconcilable on this point of law and, as such, constitute a conflicting line of cases. Because *Vaughn* is the older of those two cases, we employ its reasoning here.

State v. Gardner, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) (citations and quotation marks omitted).

Huml, 264 N.C. App. at 395, 826 S.E.2d at 545; see also *Graham v. Deutsche Bank Nat. Tr. Co.*, 239 N.C. App. 301, 306–07, 768 S.E.2d 614, 618 (2015). Therefore, if we determine that an earlier opinion of this Court, or any opinion from our Supreme Court, directly conflicts with the relevant

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holdings in *Balawejder*, we must reject the conflicting holding(s) found in *Balawejder* and follow the controlling precedent. But we must first determine if the holding in *Balawejder* actually conflicts with any prior opinions of this Court, or any opinions of our Supreme Court.

¶ 7 In order to undertake this analysis, we first consider the statutes relevant to Father’s arguments, as the trial court’s jurisdiction to consider statutory relief is granted by the General Assembly, and determined by this Court upon review by first considering the language used by the General Assembly. N.C. Gen. Stat. § 50-13.6 states in relevant part:

In an action or *proceeding* for the *custody* . . . of a minor child . . . the court may in its discretion order payment of *reasonable* attorney’s fees to an *interested party acting in good faith* who has *insufficient means* to defray the expense of the suit.

N.C. Gen. Stat. § 50-13.6 (2017) (emphasis added).

¶ 8 Father contends that the requirements of N.C. Gen. Stat. § 1-294 (2017) divested the trial court of jurisdiction to consider attorney’s fees under N.C. Gen. Stat. § 50-13.6 and, therefore, the Fee Order is void for lack of subject-matter jurisdiction. N.C. Gen. Stat. § 1-294 states: “When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, . . . but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.” N.C. Gen. Stat. § 1-294 (2017).

¶ 9 The issue of the subject matter jurisdiction retained by the trial court when one of its orders or judgments in an action is appealed is not new to the appellate courts of this state, as noted in this statement by our Supreme Court of the general rule:

An appeal from a judgment rendered in the Superior Court takes the case out of the jurisdiction of the Superior Court. Thereafter, pending the appeal, the judge is *functus officio*. *Bledsoe v. Nixon*, 69 N.C. 81; *State v. Lea*, 203 N.C. 316, 166 S.E. 292; *Vaughan v. Vaughan*, 211 N.C. 354, 190 S.E. 492; *Ridenhour v. Ridenhour*, 225 N.C. 508, 35 S.E.2d 617; *Lawrence v. Lawrence*, 226 N.C. 221, 37 S.E.2d 496.

Hoke v. Greyhound Corp., 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947) (some citations omitted): *see also McClure v. Cty. of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007). However, the general rule has

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clear statutory exceptions, including the exception in N.C. Gen. Stat. § 1-294. *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551.

¶ 10

In *McClure*, this Court addressed an order for attorney's costs and attorney's fees based upon "N.C. Gen. Stat. §§ 6-1, 6-20, 6-19.1 and 7A-314" and "the Open Meetings Law, N.C. Gen. Stat. § 143-318.16B." *McClure*, 185 N.C. App. at 466, 648 S.E.2d at 548. Under the relevant statutes in *McClure*, attorney's fees could only be awarded to the "prevailing party." N.C. Gen. Stat. § 6-1 (2019) (noting attorney's fees may be awarded "[t]o the party for whom judgment is given"); N.C. Gen. Stat. § 6-19.1 (2019) ("[T]he court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees[.]"); N.C. Gen. Stat. § 143-318.16B (2019) (noting the trial court "may award the prevailing party or parties a reasonable attorney's fee"); *see also Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 13, 545 S.E.2d 745, 752 (2001) ("[S]ection 6-20 does not authorize a trial court to include attorney's fees as a part of the costs awarded under that section, unless specifically permitted by another statute."); N.C. Gen. Stat. § 7A-314 (2019) (controlling "fees for "experts" and other "witnesses[.]" not attorney's fees). The Court in *McClure* discussed the application of N.C. Gen. Stat. § 1-294 in this context:

The question of whether the trial court had jurisdiction to decide the issue of attorney's fees is addressed by N.C. Gen. Stat. § 1-294, the pertinent portion of which reads:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

....

This Court has dealt in a number of cases with the question of whether a trial court has jurisdiction to enter an award of attorney's fees following the filing of notice of appeal. In *Brooks v. Giesey*, 106 N.C. App. 586, 590-91, 418 S.E.2d 236, 238 (1992), this Court stated that:

Under a statute such as section 6-21.5, *which contains a "prevailing party" requirement*, the

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parties should *not be required to litigate fees when the appeal could moot the issue*. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction *with regard to all matters embraced within or affected by* the judgment which is the subject of the appeal. N.C. Gen. Stat. § 1–294 (1983).

This logic was followed in the case of *Gibbons v. Cole*, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999). In that case, the trial court entered an order, dismissing plaintiff’s complaint. At the time of the hearing, defendants moved for an award of attorney’s fees and filed affidavits in support of the motion. The trial court in the written order of dismissal set a hearing on the motion for attorney’s fees for a later date, in order to allow plaintiffs an opportunity to review and respond to the affidavits. Prior to the hearing on attorney’s fees, plaintiffs filed notice of appeal. A hearing was subsequently held, and attorney’s fees were awarded to defendants. We held that “the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court.” *Id.*

There are several cases which appear to indicate a contrary result but are distinguishable. In *In re Will of Dunn*, 129 N.C. App. 321, 500 S.E.2d 99 (1998), this Court held that in a will caveat case, the trial court could enter an award of attorney’s fees after the filing of notice of appeal, because the “decision to award costs and attorney’s fees was not affected by the outcome of the judgment from which caveator appealed[.]” *Id.* at 329, 500 S.E.2d at 104–05. This holding is restricted to caveat proceedings *where the trial court has the discretion to award attorney’s fees as costs to attorneys for both sides*. *Id.* at 330, 500 S.E.2d at 105. In the case of *Surles v. Surles*, 113 N.C. App. 32, 437 S.E.2d 661 (1993), the trial court orally announced its judgment in a child custody case in open court, expressly reserving the issue of attorney’s fees. Prior to the entry of a written judgment, one of the parties gave notice of appeal.

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Subsequently, the trial court conducted a hearing on a motion for attorney's fees. Written orders on the custody matter and attorney's fees were entered after the notice of appeal was filed. This Court held that the trial court "retained the authority to consider the issue since attorney's fees were within the court's 'oral announcements'" and the written orders "conformed substantially" to those "oral announcements." *Id.* at 43, 437 S.E.2d at 667.

McClure, 185 N.C. App. at 469-70, 648 S.E.2d at 550-51 (emphasis added).

¶ 11

In *McClure*, this Court stated as an additional basis for finding the trial court lacked jurisdiction to enter the order for attorney's fees: "Further, the facts in *Gibbons* are indistinguishable from the instant case." *Id.* at 471, 648 S.E.2d at 551 (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and holding this Court was bound by its earlier decision in *Gibbons*). In *Gibbons*, this Court held:

Here, the trial court's decision to award attorneys fees *was clearly affected by the outcome of the judgment* from which plaintiffs appealed. Accordingly, the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court. G.S. 1-294; *Oshita v. Hill*, 65 N.C. App. 326, 330, 308 S.E.2d 923, 927 (1983). We vacate the trial court's award of attorneys fees and we remand to the trial court for further consideration regarding attorneys fees as the circumstances require.

Gibbons v. Cole, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999) (emphasis added). Ultimately, the Court in *McClure* "reverse[d] the trial court's order awarding plaintiff attorney's fees for lack of jurisdiction" based on the fact that the underlying order was on appeal, and "the award of attorney's fees was based upon the plaintiff being the 'prevailing party' in the proceedings" so "the exception set forth in N.C. Gen. Stat. § 1-294 [wa]s not applicable." *McClure*, 185 N.C. App. at 469-72, 648 S.E.2d at 550-52. However, as in *Gibbons*, the issue of attorney's fees was "remand[ed] . . . to the superior court for consideration of the question of attorney's fees consistent with this opinion"—*i.e.*, pursuant to a statute falling within the exception granted in N.C. Gen. Stat. § 1-294. *Id.* at 472, 648 S.E.2d at 552.

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¶ 12 Husband interprets *Balawejder* as conflicting with *McClure*, but this Court in *Balawejder* actually relied upon *McClure* in its analysis: “When, as in the instant case, the award of attorney’s fees *was based upon the plaintiff being the ‘prevailing party’ in the proceedings*, the exception set forth in N.C. Gen. Stat. § 1–294 is *not* applicable.” *Balawejder*, 216 N.C. App. at 320, 721 S.E.2d at 690 (emphasis added) (citing *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551). Conversely, when an award of attorney’s fees will not be affected by the ultimate decision in the appeal of the underlying action, no matter which party prevails nor how the issues are decided, the exception in N.C. Gen. Stat. § 1–294 is applicable, and *jurisdiction to decide the issue of attorney’s fees remains with the trial court*—without regard to the appellate status of the underlying substantive ruling of the trial court. N.C. Gen. Stat. § 1–294; *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551. Of course, *McClure* predates *Balawejder*, as do *Dunn*, *Gibbons*, and other opinions decided consistent with the plain language in N.C. Gen. Stat. § 1–294. The clear precedent demonstrates that the trial court is *not* divested of jurisdiction if the award of attorney’s fees is *not dependent upon* the outcome of the appeal of the rulings on the substantive issues. *See Swink v. Weintraub*, 195 N.C. App. 133, 160, 672 S.E.2d 53, 70 (2009).

¶ 13 We also note *Balawejder* had some procedural irregularities and defects in the record and the specific statutory and factual basis for the award of attorney’s fees in *Balawejder* was not noted in our opinion and, therefore, could not have been a factor in this Court’s analysis and decision in that opinion. *See generally Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679. In *Balawejder*, the trial court’s order addressed issues of modification of child custody and child support but, as noted, the basis upon which the trial court ordered the attorney’s fees is not identified in the opinion. *Id.* at 304, 721 S.E.2d at 681. In addition, the plaintiff in *Balawejder* claimed to be appealing from a “‘Memorandum of Judgment/Order entered by Rebecca Thorn Tin, District Court Judge, entered on July 2010 [sic] that awarded Defendant attorney’s fees in this Matter,’” but no such order was included in the record. *Id.* at 319, 721 S.E.2d at 690. Instead, the record included an attorney’s fees order entered on 1 October 2010, from which the plaintiff had not given proper notice of appeal. *Id.* Nonetheless, the *Balawejder* Court stated that the award of attorney fees in that case was based upon the plaintiff being the “prevailing party.” *Id.* at 320, 721 S.E.2d at 690. This Court’s decision in *Balawejder*—holding that if the award of attorney’s fees is predicated on the party to whom the fees were awarded prevailing on appeal, the exception to the general rule, both of which are set forth in N.C. Gen. Stat. § 1–294, does not apply—is consistent with the analyses in

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McClure and other cases cited above. *Id.* Having found that the basis for the award of attorney's fees in *Balawejder* was dependent on the outcome of the appeal from the underlying substantive order, this Court further determined, in accordance with N.C. Gen. Stat. § 1-294, that the trial court had been divested of jurisdiction by the appeal of that prior order. *Id.*

¶ 14 We hold “under the controlling reasoning of *McClure*, *Gibbons*, [*Brooks*,” *Safie Mfg. Co.*, *Herring*, *Hinson*, *Green*, *Cox*, and other opinions herein cited, that it is *only* when “an award of costs is directly dependent upon whether the judgment is sustained on appeal[,]” that, under N.C. Gen. Stat. § 1-294, the “trial court lacks jurisdiction to enter an award of costs . . . once notice of appeal has been filed as to the [underlying] judgment.” *Swink*, 195 N.C. App. at 160, 672 S.E.2d at 70. Therefore, the question relevant to the analysis in this case is whether the award of attorney's fees to Mother under N.C. Gen. Stat. § 50-13.6 constituted a “matter included in the action and not affected by the judgment appealed from.” N.C. Gen. Stat. § 1-294. Nothing in the plain language of the statute suggests a determination that an interested party has acted in good faith or has insufficient means to cover the costs associated with the action are determinations contingent on the ultimate outcome of an appeal, by either party, from the underlying judgment. *Id.* In prior cases, awards of attorney's fees under N.C. Gen. Stat. § 50-13.6 have been upheld even for the party who did not prevail at trial. *See Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002). For example, in *Burr*, this Court affirmed in part an order awarding attorney's fees to the defendant, who was not the prevailing party. *Id.* at 506, 570 S.E.2d at 224. In *Burr*, the trial court awarded custody to the plaintiff and ordered the defendant to pay child support, but also ordered plaintiff, the prevailing party, to pay defendant's attorney fees as to the child custody and support claims. *Id.* at 506–07, 570 S.E.2d at 224.

¶ 15 *Burr* helps demonstrate that the clear intent of N.C. Gen. Stat. § 50-13.6 is to allow the trial court the discretion to ensure one parent in a custody action will not have an inequitable advantage over the other parent—based upon a parent's inability to afford qualified counsel. *See Id.* at 506, 570 S.E.2d at 224. North Carolina General Statute § 50-13.6 concerns leveling the field in a custody action by ensuring each parent has competent representation. N.C. Gen. Stat. § 50-13.6. The trial court's authority to award attorney's fees under N.C. Gen. Stat. § 50-13.6 does not depend upon who “wins” any particular ruling in a custody proceeding. *See Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224 (“Plaintiff here argues that because defendant did not prevail at trial, the award of at-

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torney's fees to defendant was improper. We disagree.”). This Court in *Burr*, citing our Supreme Court, recognized two findings the trial court must make to award attorney's fees under N.C. Gen. Stat. § 50-13.6:

Th[e] award of attorney's fees is not left to the court's unbridled discretion; it must find facts to support its award. *See Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975), *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980). Specifically, the trial court was required to make two findings of fact: that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. *Hudson*, 299 N.C. at 472, 263 S.E.2d at 723. “When the statutory requirements have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion.” *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724.

Burr, 153 N.C. App. at 506, 570 S.E.2d at 224.

¶ 16 In *Wiggins*, the plaintiff argued that, after the appeal of the order denying the plaintiff's motion for civil contempt in a custody action, the trial court was without jurisdiction to order attorney's fees under N.C. Gen. Stat. § 50-13.6, “because [the] defendant was not both the moving and prevailing party[.]” *Wiggins*, 198 N.C. App. at 696, 679 S.E.2d at 877. This Court concluded:

If the proceeding is one covered by N.C. Gen. Stat. § 50-13.6, as is the case here, *and the trial court makes the two required findings regarding good faith and insufficient means*, then *it is immaterial whether the recipient of the fees was either the movant or the prevailing party*. Thus, we hold the trial court had statutory authority to award fees to defendant in this case.

Id. at 696–97, 679 S.E.2d at 877 (emphasis added).

¶ 17 In this case, the trial court made extensive findings of fact in the Fee Order, which are not challenged by Father, and thus binding on appeal. *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). The trial court also made the following unchallenged ultimate findings and conclusions, which are supported by the findings of fact:

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Pursuant to N.C.G.S. § 50-13.6 and applicable North Carolina case law, [M]other is an interested party, acting in good faith, and lacks sufficient means to fully defray the costs of litigation in relation to her Motion for Contempt, and she therefore is entitled to an award of attorney's fees incurred in connection with her Motion for Contempt.

¶ 18

None of the necessary findings made by the trial court were dependent on Mother's success at trial, and none will be affected by our decisions in Father's appeal of the underlying custody order in COA19-866. Since the award of attorney's fees in the Fee Order was not dependent upon the outcome of the contempt proceeding in the underlying custody action, Father's appeal of the Custody Order in COA19-866 did not divest the trial court of jurisdiction to enter the Fee Order granting Mother attorney's fees under N.C. Gen. Stat. § 50-13.6. N.C. Gen. Stat. § 1-294; N.C. Gen. Stat. § 50-13.6; *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224; *Wiggins*, 198 N.C. App. at 696–97, 679 S.E.2d at 877. The trial court, having retained jurisdiction to award Mother attorney's fees under N.C. Gen. Stat. § 50-13.6, even after the appeal in COA19-866 was filed and perfected, conducted a hearing and entered the Fee Order including the unchallenged ultimate findings and conclusions that Mother, an interested party, acted in good faith and lacked sufficient means to defray the costs of litigation. These findings were sufficient to support the award of attorney's fees under N.C. Gen. Stat. § 50-13.6. For the reasons discussed above, we hold that the trial court had jurisdiction to enter an award of attorney's fees under N.C. Gen. Stat. § 50-13.6 after Father appealed the order in COA19-866, and Father fails to demonstrate any error in the Fee Order. We therefore affirm.

AFFIRMED.

Judges ZACHARY and GORE concur.

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NICOLE J. BLANCHARD, PLAINTIFF

v.

DAVID M. BLANCHARD, DEFENDANT

No. COA19-866

Filed 21 September 2021

1. Child Custody and Support—contempt motion—seeking civil and criminal contempt—notice of alleged contemptuous actions—hearing on civil contempt

Where a mother's contempt motion alleging that her children's father had willfully violated the parties' custody order sought to hold the father in both civil and criminal contempt, the Court of Appeals did not need to address whether the father's due process rights were violated by lack of notice of the nature of the contempt charges, because the father had proper notice of his alleged contemptuous actions and the trial court considered only civil contempt at the hearing.

2. Child Custody and Support—custody order—violation—reasonable telephone or video access to children—bad faith

The trial court's order holding a father in civil contempt for willful violation of a custody order was properly supported by the evidence and factual findings where the custody order required the father to provide daily unrestricted and reasonable telephone or video contact with the children to the mother while the children were visiting him, yet the father blocked the mother on his cell phone and arbitrarily chose to turn on the children's iPad each evening from 6:00 p.m. to 6:30 p.m. without informing the mother that she should call during that time period.

3. Child Custody and Support—contempt order—purge conditions—allowing the mother phone or video access to the children

Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and ensure that the children's iPad was able to connect to calls with the mother (or allow his own phone to be used for the calls), and giving him time to purge the contempt in order to avoid incarceration—were proper and affirmed by the appellate court. The father's arguments to the contrary were meritless.

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4. Child Custody and Support—contempt order—purge conditions—not modification of custody order

Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and communicate with her to arrange the calls with the children—did not improperly modify the parties' custody order. While the custody order did not set out exact times and methods for the telephone or video communication between the parties and the children, the purge conditions were consistent with the custody order and applied only until the father had purged the contempt.

Appeal by Defendant from order entered 2 April 2019 by Judge Paige B. McThenia in District Court, Mecklenburg County. Heard in the Court of Appeals 9 June 2020.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit and Haley E. White, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant-Father appeals from the trial court's order (the "Contempt Order") holding him in civil contempt of provisions of a consent order regarding custody of the children (the "Custody Order") involving communication between the children and Plaintiff-Mother when the children were in his care. On appeal Father has raised a constitutional due process argument claiming he did not have sufficient notice as to whether Mother sought to hold him in civil or criminal contempt as to specific allegations of violations of the Custody Order. We need not address this argument because prior to hearing, Mother elected to proceed only as to civil contempt on two specific allegations, and the trial court heard and ruled on only these allegations. Father also contends the trial court erred by holding him in civil contempt and that the purge conditions were improper. Because the trial court's findings of fact support its conclusions of law, the trial court did not err by holding Father in civil contempt. Because the trial court set forth clear and specific purge conditions, and these conditions are not modifications of the Custody

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Order, we affirm the trial court's order. This opinion is filed contemporaneously with Father's appeal of the trial court's order awarding Mother attorney's fees, COA20-165. The attorney's fees order was entered after Father's appeal of the Custody Order.

I. Factual and Procedural Background

¶ 2 Mother and Father were married in 2007, had three children, and separated on 2 March 2015. Mother filed the complaint including a claim for custody on 6 March 2015. The Custody Order was entered on 6 November 2015 and granted primary physical custody of the children to Mother and regular specific visitation to Father. The "General Provisions Governing Custody" section of the Custody Order also included a provision regarding daily telephone and FaceTime contact between the children and each parent when the children are with the other parent (the "FaceTime Provision"). Under the FaceTime Provision, "[e]ach party shall generally have unrestricted but reasonable telephone contact with the minor children. The parties agree to make the minor children available to the non-custodial parent for phone or FaceTime contact for fifteen minutes each evening."

¶ 3 Mother alleged that Father had been violating the FaceTime Provision in the Custody Order, and she filed a "Motion for Contempt" (the "Contempt Motion") on 3 January 2019, in which she moved the trial court to "[i]ssue a Show Cause Order, directing that a hearing be conducted . . . and, at such hearing, order Father to show cause as to why [he] should not be held in contempt for his violations of the Custody Order." The Contempt Motion requested the trial court find Father in civil contempt, force Father's compliance with the terms of the FaceTime Provision, and find him in criminal contempt, "as a result of his willful failure to comply with the provisions of the Custody Order as set forth" in the Contempt Motion. Mother also requested the trial court order "a reasonable attorney's fee for all time and costs expended . . . in connection with the preparation, filing, and prosecution of" the Contempt Motion "and make such payment a purging condition of Father's contempt[.]" Mother requested that the trial court "order Father to show cause as to why [he] should not be held in contempt for his violations of the Custody [O]rder[.]"

¶ 4 The trial court entered an Order to Show Cause (the "Show Cause Order") on 10 January 2019, in which it found "probable cause to believe that a civil and/or criminal contempt [by Father] has occurred, and a hearing should be conducted on the[] allegations" contained in Mother's Contempt Motion. (Emphasis removed.) Father was ordered to appear before the trial court on 12 February 2019 "and show cause, if any, as to

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why [he] should not be held in contempt.” Father filed a Motion to Dismiss and in the Alternative Motion for More Definite Statement (the “Motion to Dismiss”) on 1 February 2019, in which Father requested that the trial court either “dismiss with prejudice [the Contempt Motion] . . . on the basis of N.C.R.C.P. 12(b)(6), N.C.G.S. 5A-23(g), and/or violation of [Father’s] constitutionally protected right to due process of law pursuant to the 5th and 14th Amendments” or, in the alternative, to grant Father’s “Motion for a More Definite Statement[.]” In Father’s motion, he argued that Mother had “failed to state a claim upon which relief can be granted”—contending that because “[a] person who is found in civil contempt under [] Article [2, Chapter 5A] shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter[.]” N.C. Gen. Stat. § 5A-23(g) (2019), it was impossible for him to know whether Mother’s motion to show cause, which included claims of both civil and criminal contempt—based upon the same evidence—would result in a civil contempt hearing or a criminal contempt hearing. Father’s requests were based on his argument that Mother had not specifically stated in the Contempt Motion the alleged violations of the Custody Order that would be pursued as civil contempt and those that would be prosecuted as criminal contempt. Father contended that Mother “not providing clear notice in the [Contempt Motion] nor the . . . Show Cause [Order] prevents Father from having clear notice as to which form of contempt is sought and makes Father susceptible to gross errors in the proceedings and his defenses in such proceedings; this violates Father’s right to due process.” Father filed a Motion to Continue (the “Motion to Continue”) one week later, arguing that he should be given time to argue the Motion to Dismiss before the hearing on the Contempt Motion. Father’s motions were heard and denied on 12 February 2019, just prior to commencement of the contempt hearing.

¶ 5 Father’s Motion to Continue was formally denied by order entered 15 February 2019, and the trial court’s denial of the Motion to Dismiss was formally denied within the trial court’s 2 April 2019 Order (Re: Civil Contempt) (the “Contempt Order”). In the Contempt Order, the trial court found Father to be in violation of the Custody Order. The issue of attorney’s fees was reserved to be heard at a later date. Father appealed.

II. Interlocutory Appeal

¶ 6 The Contempt Order on appeal is an interlocutory order as it does not resolve all pending claims. The appeal of a contempt order affects a substantial right and is immediately appealable. *See Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) (“The appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable. *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198

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(1976); see *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000”).

III. Analysis**A. Standards of Review**

The standard of review of orders from contempt proceedings is limited to determining whether competent evidence supports the findings of fact and whether those findings support the conclusions of law. *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). Where the admitted evidence supports the trial court’s findings, those findings are binding on appeal “even if the weight of the evidence might sustain findings to the contrary.” *Hancock v. Hancock*, 122 N.C. App. 518, 527, 471 S.E.2d 415, 420 (1996). “[T]he credibility of the witnesses is within the trial court’s purview.” *Scott v. Scott*, 157 N.C. App. 382, 392, 579 S.E.2d 431, 438 (2003).

Wilson v. Guinyard, 254 N.C. App. 229, 235, 801 S.E.2d 700, 705 (2017).

¶ 7 We also review *de novo* the trial court’s “apprehension of the law” to determine if the trial court considered the issues under the correct legal standards. See generally *id.* So long as the trial court applied the correct law in its analysis and ruling, we conduct the regular *de novo* review to determine if the trial court’s legal conclusions are supported by its findings of fact. *Id.*

B. Due Process Requirements

¶ 8 [1] In Father’s first argument, he contends that “[t]he trial court violated [his] due process rights by denying his request to be notified of the nature of the contempt charges prior to the beginning of the [contempt] hearing.” We disagree.

¶ 9 Father argues that “the trial court violated [Father’s] due process rights by denying his request to be notified of” the “criminal or civil nature of the allegations” of “the contempt charges prior to the beginning of the hearing.” (Capitalization altered.) The sole allegation in Father’s argument is that the notice given to him failed to inform him whether each of Mother’s seven allegations of Father’s violation of the Custody Order would be pursued for civil contempt or would be prosecuted for criminal contempt; and that this alleged failure to provide Father proper notice violated his due process rights as guaranteed by the Constitution of the United States.

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¶ 10 On 12 February 2019, just prior to the contempt hearing, Father argued that his motions to dismiss should be considered and decided before the contempt hearing and requested a continuance of the contempt hearing. Mother's attorney informed the trial court that "we'll probably have to bifurcate since there are some issues related to criminal and some issues related to civil [contempt,]" and Mother's attorney estimated the hearing would take "an hour." The trial court responded: "I think we can't do anything over twenty minutes." Mother's attorney suggested "that we . . . pursue the civil contempt issue within the twenty minute rule, and if we don't have time to hear the criminal we can find another date[.]"

¶ 11 Father's attorney responded: "We were just told ten minutes ago . . . whether those [allegations] are civil or criminal." Father's attorney explained: "So there's not [] sufficient notice, and Father is entitled to time to prepare an appropriate defense and address the matters specifically as criminal or specifically as civil[,]" because

the procedures for a civil trial and procedures for a criminal trial are very different, and the constitutional safeguards are very different. So it is Father's fundamental constitutional right . . . to not to have yourself incriminated and right to not testify against yourself and the due process clause of the 14th Amendment as to know what procedures you're going to go forward with before you get there.

¶ 12 More specifically, Father argued that Mother failed to state a claim "as she did not clearly state whether she [was] seeking to hold Father in civil contempt or criminal contempt for each individual allegation made" against Father. Father further alleged this lack of a more specific notice violated his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Father stated: "For civil contempt, the [trial court] follows civil procedure[,]" whereas "[f]or criminal contempt, the [trial court] follows criminal procedure." Father contended that because "[a] person cannot be held in both civil and criminal contempt[,]" he had "a right to know which type of contempt [was] sought before the hearing so that his defense [could] be properly made."

¶ 13 The trial court asked Father: "But you've [been informed of] all of the *allegations*, correct?" (Emphasis added.) Father confirmed that he did, but again argued that Mother's motion did "not specify whether they are civil contempt *allegations* or criminal contempt *allegations*." (Emphasis added.)

¶ 14 The trial court denied Father's Motion for Continuance by order entered 15 February 2019. In the Contempt Order the trial court

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“denied . . . Father’s Motion to Dismiss and Motion for More Definite Statement[,]” stating:

After considering the arguments of counsel and the relevant case law presented, the [trial court] concluded that [Mother] was not required to elect civil or criminal contempt as to each alleged violation within a specified period of time prior to the contempt hearing; it is sufficient that the Order to Show Cause gave notice to [Father] that there was probable cause to believe a civil and/or criminal contempt had occurred based on the allegations in [Mother]’s Motion for Contempt.

¶ 15 Mother contends Father “failed to preserve his due process challenge for appellate review.” Mother notes that Father did not file a notice of appeal from either the trial court’s Order to Show Cause or the order denying his Motion to Continue, and argues that because he did not appeal from these orders, Father failed to preserve this issue for review. Mother also argues that prior cases have not required the moving party to elect either civil or criminal contempt before the hearing.

¶ 16 Both parties have made extensive arguments on the due process issue, but based upon the record before us, we need not address this issue because Father had proper notice of the alleged contemptuous actions, and the trial court only considered civil contempt at this hearing. Father argues Mother should have been required to elect before the hearing whether to pursue civil or criminal contempt, and although we do not address whether Mother was *required* by law to make this election, she *did* in fact inform Father, prior to the hearing, which allegations would form the basis of her action for civil contempt.

¶ 17 At the start of the hearing, due to the time constraints on the trial court, Mother elected to “pursue the civil contempt issue within the twenty-minute rule, and if we don’t have time to hear the criminal we can find another date.” In addition, the civil contempt hearing was limited to allegations contained in “paragraphs 5 and 6 [of Mother’s] Motion for Contempt[.]”¹ The trial court held Father in civil contempt based solely on his violations of the allegations of paragraphs 5 and 6 of the Contempt Motion—specifically, the trial court found that Father violated the provision in the Custody Order requiring each party to provide “Unrestricted Telephone Contact” by making “the minor children available to the non-custodial parent for phone

1. The Contempt Motion included other alleged violations of the Custody Order in paragraphs 3,4,7, and 8. These allegations were not addressed at the hearing or in the Contempt Order.

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or FaceTime contact for fifteen minutes each evening.” The Contempt Order is the only order before this Court on appeal.

¶ 18 Mother’s Contempt Motion and the Show Cause Order gave Father detailed notice of the factual allegations regarding his failure to allow phone or FaceTime access prior to the hearing, and the trial court only heard Mother’s claim of civil contempt regarding the allegations in paragraphs 5 and 6 of the Contempt Motion. Although the Contempt Motion did present other allegations of violations of the Custody Order, and in it Mother requested criminal contempt, the trial court did not address those issues at the contempt hearing or in the Contempt Order. Father’s arguments ask this Court to speculate about issues which may have arisen *if* the trial court had denied his Motion to Continue and his Motion to Dismiss and *then* held a hearing *on both civil and criminal contempt on all the allegations* in Mother’s Contempt Motion. However, the hearing was “bifurcated,” and the trial court considered *only* civil contempt based on the two specifically identified allegations. We will address on appeal only the arguments based on the issues presented and decided at the hearing and included in the trial court’s order. *Shell Island Homeowners Ass’n, Inc. v. Tomlinson*, 134 N.C. App. 286, 291, 517 S.E.2d 401, 404–05 (1999) (“Courts have no jurisdiction to determine matters that are speculative, abstract, or moot, and they may not enter anticipatory judgments, or provide for contingencies which may arise thereafter.”). Our review is limited to the proceedings that actually occurred, are relevant to the trial court’s findings, conclusions, and rulings resulting in the Contempt Order, and the Contempt Order itself. We dismiss Father’s due process arguments.

C. Compliance at Time of the Hearing

¶ 19 [2] In his second argument, Father contends “the trial court erred in holding [him] in civil contempt when he was in compliance at the time of the hearing.” Father argues that “trial court’s own findings of fact show that [Father] was in compliance with the FaceTime access provisions of the custody order at the time of the hearing so he could not have been held in contempt.” Father contends that since Finding of Fact 17 states that he had turned on the iPad from 6:00 p.m. to 6:30 p.m., he had complied with the Custody Order, stating “the trial court erred in holding [him] in civil contempt when he was in compliance at the time of the hearing.” We disagree.

¶ 20 The trial court found these facts relevant to Father’s argument:

4. The Custody Order provides, among other things, as follows:

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C(g). Unrestricted Telephone Contact. Each party shall generally have *unrestricted but reasonable* telephone contact with the minor children. The parties agree to *make the minor children* available to the non-custodial parent for *phone or FaceTime* contact for fifteen minutes each evening.

....

12. Since the entry of the Custody Order, [Father] has willfully violated the terms of the Custody Order by *willfully failing to provide [Mother] with FaceTime access* to the minor children during his periods of custodial time.

13. On April 28, 2018, three (3) days after getting remarried, [Father] emailed [Mother] informing her that he set up the minor children's iPad for FaceTime so that [Mother] could FaceTime the minor children directly, and that he would ensure that the iPad was turned on and charged. Prior to this, [Mother] sent and received FaceTime calls with the minor children through [Father]'s phone.

14. On April 29, 2018, [Father] *blocked [Mother]'s phone number from his cell phone*. As a result, email was [Mother]'s only means of communication with [Father], and the only way she could request FaceTime calls with the minor children when her calls to the minor children's iPad went unanswered. Since that time, *[Father] has continuously ignored [Mother]'s repeated requests to FaceTime the minor children* during [Father]'s custodial time, despite [Mother] informing [Father] that her calls to the minor children's iPad had gone [un]answered.

15. From April 30, 2018 through September 2018, *[Mother] called the minor children's iPad at least sixty four (64) times*, but *none* of her calls were answered. During this time, *[Father] only allowed [Mother] FaceTime access to the minor children on three (3) occasions*.

16. *Beginning in or around September 2018*, [Mother] could *no longer FaceTime the minor children's iPad*

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from her phone *because the children's iPad was either turned off, not connected to WiFi, or FaceTime was disabled.*

17. [Father] *arbitrarily chose* to turn the minor children's iPad on each evening from 6:00 p.m. to 6:30 p.m. *without informing [Mother]* that she should call during that thirty (30) minute time period. From May 2018 *through the hearing of this Motion*, [Mother] sent numerous text messages and emails to [Father] asking to FaceTime the minor children. *[Father] did not respond to any of [Mother]'s FaceTime requests.*

18. On one occasion, after [Mother] requested a FaceTime call with the minor children, [Father] sent her a copy of his marriage license. [Father] saved [Mother]'s contact information in his phone as "Psycho Bitch." *This conduct evidences the willful nature of [Father]'s failure to allow [Mother] FaceTime access to the minor children.*

19. [Mother]'s counsel wrote [Father]'s counsel on *seven (7) occasions* [between 25 June 2018 and 2 November 2018] *regarding [Father]'s refusal to allow [Mother] to FaceTime the minor children.* Despite [Mother]'s counsel's efforts, *[Father] continued to deny [Mother] FaceTime access to the minor children.*

(Emphasis added.)

¶ 21 Father does not challenge the findings of fact as unsupported by the evidence but argues that the findings demonstrate that because he had the children's iPad on each evening from 6:00 p.m. to 6:30 p.m., he complied with the terms of the Custody Order. Father's argument takes a portion of finding 17 out of context in order to argue it was made in error, asserting the "[b]ecause the [trial] court specifically found that [Father] was providing access between 6 p.m. and 6:30 p.m., finding 12 that [Father] has failed to provide access must be interpreted as" a finding that Father was in compliance with the FaceTime Provision at the time of the contempt hearing. The full sentence in finding 17 reads: "Father arbitrarily chose to turn the minor children's iPad on each evening from 6:00 p.m. to 6:30 p.m. *without informing [Mother] that she should call during that thirty (30) minute time period.*" (Emphasis added.) Without citation to the transcript, Father also argues that "[t]he

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uncontroverted testimony was that a week or two before trial, Father made Mother aware of the accessibility window, and that Father had had the children available during that time.” But it is the trial court that determines the credibility and weight of the evidence and, here, the trial court found Mother’s evidence of Father’s refusal to respond to her many requests regarding her inability to contact the children more credible than Father’s contentions to the contrary.

¶ 22 At the hearing, Father contended that the Custody Order does not “direct a specific time for the facetime to occur[,]” only that Father ensure “availability for fifteen minutes in the evening[.]” Father contends that the thirty minute window in which he claimed to have made the iPad available for FaceTime calls—from 6:00 p.m. to 6:30 p.m.—proved his compliance with the specific language of the Custody Order. Father is correct that the Custody Order did not specify an exact time for the contact, but it did provide for “*unrestricted but reasonable* telephone contact” and for the parties “to *make the minor children available* to the non-custodial parent for *phone or FaceTime* contact for fifteen minutes each evening.” (Emphasis added.) Both parties understood the Custody Order and what was required to follow it in good faith. *See Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003).

¶ 23 The trial court’s findings addressed the changes in Father’s compliance with the Custody Order following his remarriage:

[T]hree (3) days after getting remarried, [Father] emailed [Mother] informing her that he set up the minor children’s iPad for FaceTime so that [Mother] could FaceTime the minor children directly, and that he would ensure that the iPad was turned on and charged. Prior to this, [Mother] sent and received FaceTime calls with the minor children through [Father]’s phone.

14. On April 29, 2018, [Father] blocked [Mother]’s phone number from his cell phone.

¶ 24 After blocking Mother’s phone number from his phone, Father was repeatedly informed and was well-aware that Mother had not been able to contact the children, but he still refused to make the children available as required by the Custody Order. Father argues that the trial court’s other findings, such as Father blocking Mother’s number from his phone, sending Mother a copy of his marriage license, and saving Mother’s contact information in his phone as “psycho Bitch,” are irrelevant to the question of whether he complied with the Custody Order. But these findings are relevant, as they demonstrate why Father suddenly be-

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gan to block Mother's phone calls. This was not a random technological glitch or a few missed calls; Father's actions, as found by the trial court, demonstrate exactly *why* Father intentionally changed the method of communication, and thus show the willfulness of his actions.

¶ 25 Clearly, the trial court did not find Father's testimony that he was unaware of any problems regarding phone or FaceTime contact credible, as it included the following findings—unchallenged by Father—in the Contempt Order: “Father has continuously ignored [Mother]’s repeated requests to FaceTime the minor children during Father’s custodial time, despite [Mother] informing Father that her calls to the minor children’s iPad had gone [un]answered[;]” “[Mother] called the minor children’s iPad at least sixty four (64) times, but none of her calls were answered. During this time, Father only allowed [Mother] FaceTime access to the minor children on three (3) occasions[;]” “[b]eginning . . . around September 2018, [Mother] could no longer FaceTime the minor children’s iPad . . . because the children’s iPad was either turned off, not connected to WiFi, or FaceTime was disabled[;]” “[f]rom May 2018 *through the hearing of this Motion*, [Mother] sent numerous text messages and emails to Father asking to FaceTime the minor children. Father *did not respond to any of [Mother]’s FaceTime requests[;]*” “[Mother]’s counsel wrote Father’s counsel on seven (7) occasions [between 25 June 2018 and 2 November 2018] regarding Father’s refusal to allow [Mother] to FaceTime the minor children. Despite [Mother]’s counsel’s efforts, *Father continued to deny [Mother] FaceTime access* to the minor children[;]” and “Father *arbitrarily chose* to turn the minor children’s iPad on each evening from 6:00 p.m. to 6:30 p.m. *without informing [Mother]* that she should call during that thirty (30) minute time period.” (Emphasis added.)

¶ 26 These and other findings demonstrate the trial court considered, but rejected, Father’s testimony (1) that he was unaware of Mother’s FaceTime concerns and difficulties, (2) that he did not believe Mother had tried to FaceTime the children in the time period between her filing of the Contempt Motion and the contempt hearing, and (3) that he had never “purposely denied facetime” or “phone contact” between the children and Mother. Concerning Father’s testimony regarding “phone contact,” the trial court also found as fact, unchallenged by Father: “On April 29, 2018, Father blocked Mother’s phone number from his cell phone. As a result, email was Mother’s only means of communication with Father” by which “she could request FaceTime calls with the minor children when her calls to the minor children’s iPad went unanswered.”

¶ 27 Father’s argument relies upon the unsupported contention that he can engage in conduct that contravenes the clear intention of the

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Custody Order, so long as the Custody Order did not specifically name the *precise means* by which Father was required to comply with its obvious purpose. However, as this Court has noted:

Our Supreme Court, in determining whether a party was in contempt for violating a temporary restraining order, stated that “[t]he order of the court must be obeyed implicitly, *according to its spirit and in good faith.*” A party “‘must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so.’”

Middleton, 159 N.C. App. at 226, 583 S.E.2d at 49 (emphasis added) (citations omitted). Implicit in every order is the understanding that its terms will be honored in good faith—that the parties bound by it will act under the dictates of common sense and reasonableness. *See, e.g., American Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (1979) (finding contempt where the contemnor’s acts violated the “spirit” of the order).

¶ 28 Although the Custody Order did not set out the details of the “unrestricted Telephone Contact” between the parties and children, for about three and one-half years after the entry of the Custody Order, the parties had developed a method of communication and used it consistently until immediately after Father’s remarriage—when he unilaterally changed how Mother could contact the children, and refused to respond to Mother’s notifications that she was unable to do so.

¶ 29 We hold that the evidence supports all of the trial court’s findings of fact, including finding of fact 12, and the findings support the trial court’s ultimate findings and conclusions that the Custody Order was still “valid and enforceable[,]” that the purposes “of the Custody Order may still be served by Father[’s] compliance” with the “Unrestricted Telephone Contact” provision, that Father had “at all times, been fully aware of the Custody Order” and its requirements, that Father “has had the ability to comply with the Custody Order[,]” and, therefore, that “Father[’s] failure to comply with the terms of the Custody Order as set forth [in the telephone and FaceTime provisions] is willful and constitutes a civil contempt of Court.” This argument is without merit.

D. Purge Conditions

¶ 30 [3] Father argues that even if he was properly found to be in civil contempt, the purge conditions in the Contempt Order were “improper” and, therefore, “the [C]ontempt [O]rder should be vacated.” We disagree.

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¶ 31

The trial court's decree set out the purge conditions:

4. [Father] has the present ability to comply with the terms of the Custody Order. [Father] may purge himself of the contempt by unblocking Mother's number from his cell phone so that she can call or text Father to arrange a time for Mother to visit with the minor children via FaceTime; install FaceTime on the children's [iP]ad and ensure that it is functioning properly; ensure that the children's [iP]ad is charged and connected to Wifi so that Mother can FaceTime with the children on the [iP]ad; and, if the children's [iP]ad is not functioning, allow the children to FaceTime with Mother on Father's phone.

5. The [trial court] recognizes that the purpose of civil contempt is to obtain compliance with a court order and that the only sanction for civil contempt is imprisonment until a defendant complies with that order. The [trial court] also recognizes that [Father's] present ability to comply with the terms of the Custody Order requires that [he] be present in the home for a period of time to install FaceTime on the children's [iP]ad, ensure that it is functioning properly, and ensure that the children's [iP]ad is charged and connected to Wifi (or arrange for someone else to perform these tasks on his behalf), and that [Father] must have actual possession of his phone in order to unblock Mother's number and arrange a time for her to contact the children. The [trial court,] therefore, is postponing [Father's] report date to the Mecklenburg County Jail until April 12, 2019 in order to allow [Father] the opportunity to take the necessary steps to purge himself of the contempt and thus come into compliance with the terms of the Custody Order. Prior to [Father] being taken into custody, this [c]ourt shall hear briefly from the parties about the actions [he] has taken to purge himself of contempt. The [trial court] shall conduct a review hearing on April 10, 2019 from 12:00 to 12:15 p.m.

¶ 32

Father first contends that "[t]he purge conditions *do not set a date by which [Father] will have purged himself* of contempt and so the contempt order should be vacated." (Emphasis added.) Father also

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contends that the purge conditions are improper because the order “sentences [Father] to jail without the appropriate findings that he has the ability to purge contempt and avoid incarceration.” Father contends the improper purge conditions were the ones requiring him to “unblock[] Mother’s number from his cell phone[,]” “install[] FaceTime on the children’s [iP]ad[,] and ensure that it is functioning properly.”

¶ 33 “A contempt order ‘must specify how the person may purge himself of the contempt.’ N.C. Gen. Stat. § 5A–22(a)[.]” *Wellons v. White*, 229 N.C. App. 164, 181, 748 S.E.2d 709, 722 (2013). Citing *Wellons*, Father argues that “[t]he purge conditions must specify when compliance has purged the contempt—a party may not be held in contempt indefinitely.” Father appears to interpret *Wellons* as containing a holding from this Court that if “the purge conditions . . . do not set a date by which [a contemnor] purge will be complete, the contempt order should be vacated.” Father is incorrect. In *Wellons*, the trial court held: “[T]he district court erred by failing to provide [the contemnor] a method to purge his contempt.” *Id.* at 182, 748 S.E.2d at 722. This Court then set forth the deficiencies of the contempt order:

On 5 July 2012, the district court “declared [the contemnor] to be in direct and [willful] civil contempt of the prior Orders of the Court.” It suspended [the contemnor]’s arrest based on the following condition: “[The contemnor] can purge his contempt by fully complying with the terms of the [30 March 2012] Interim Order, the prior Orders of 28 December 2007 and 27 July 2010. and this Order.” The order did not establish a date after which [the contemnor]’s contempt was purged ***or provide any other means for [the contemnor] to purge the contempt.***

Id. (emphasis added). In *Wellons*, we simply held that the purge conditions in the contempt order “were ‘impermissibly vague[,]’ ” *id.*, because they did not clearly inform the contemnor what actions he had to undertake to purge his contempt and secure his release—therefore, it was possible the contemnor could be held indefinitely, with no meaningful way to purge his contempt. In *Wellons*, the trial court did not clearly state the purge conditions, it simply required the contemnor to comply with the prior court orders indefinitely—so in that case the contemnor would never be able to purge the contempt as long as the orders were in effect. *Id.*

¶ 34 In *Kolczak v. Johnson*, 260 N.C. App. 208, 817 S.E.2d 861 (2018), this Court reversed a civil contempt order based upon the mother’s violation of visitation provisions of a custody order. *Id.* at 220, 817 S.E.2d at 869.

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In *Kolczak*, the order set forth several conditions for the mother's visitation, including not allowing the children to have any contact whatsoever with her new husband, who had been involved in and arrested for various crimes, or his criminal associates. *Id.* at 213, 817 S.E.2d at 865. The mother was also required to notify the father within 24 hours if she or her new husband were arrested again; he was arrested again, and the mother did not properly notify the father. *Id.* The trial court found that mother was in contempt of the order for her failure to notify the father of an arrest and allowing her husband to be present at her residence when the children were there, as well as registering the children in a summer camp without consulting the father in violation of first-refusal provisions. *Id.* The contemptuous actions all arose from visitation provisions of the custody order, and all were discrete incidents which had occurred in the past. *Id.* Although the trial court held the mother in civil contempt, the order did not include *any* purge condition. *Id.*

¶ 35

In *Kolczak*, this Court discussed the difficulty of creating an appropriate purge condition in this situation:

[I]n this case, the contempt is primarily based upon communication and visitation provisions of the orders, not child support. It is not apparent from the order how an appropriate civil contempt purge condition could “coerce the defendant to comply with a court order” as opposed to punishing her for a past violation. *Wellons v. White*, 229 N.C. App. 164, 181, 748 S.E.2d 709, 722 (2013). And here the trial court did not order vague purge conditions; it ordered none at all.

We believe this case is more similar to *Wellons* than *Lueallen*. Compare *Lueallen*, 790 S.E.2d 690; *Wellons*, 229 N.C. App. 164, 748 S.E.2d 709. In *Wellons*, the Court addressed a father's denial of the grandparent's visitation privileges established by a prior order. See *Wellons*, 229 N.C. App. at 165, 748 S.E.2d at 711. In *Wellons*, the trial court held the father in civil contempt for denial of visitation and ordered that he comply with the terms of the prior orders as a purge condition, but this Court reversed the contempt order[.]

....

We have previously reversed similar contempt orders. For instance, in *Cox* a contempt order stated the defendant could purge her contempt by not:

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placing either of the minor children in a stressful situation or a situation detrimental to their welfare. Specifically, the defendant is ordered not to punish either of the minor children in any manner that is stressful, abusive, or detrimental to that child.

There, we reversed because the trial court failed to clearly specify what the defendant can and cannot do to the minor children in order to purge herself of the civil contempt.

Similarly, in *Scott* a contempt order stated: Defendant may postpone his imprisonment indefinitely by (1) enrolling in a Controlled Anger Program approved by this Court on or before August 1, 2001 and thereafter successfully completing the Program; (2) by not interfering with the Plaintiff's custody of the minor children and (3) by not threatening, abusing, harassing or interfering with the Plaintiff or the Plaintiff's custody of the minor children.

There, although we indicated the requirement to attend a Controlled Anger Program may comport with the ability of civil [violators] to purge themselves, we reversed because the other two requirements were impermissibly vague.

In the case at hand, the district court did not clearly specify what Mr. White can and cannot do to purge himself of contempt. Although the district court referenced previous orders containing specific provisions, it did not: (i) establish when Mr. White's compliance purged his contempt; or (ii) provide any other method for Mr. White to purge his contempt. We will not allow the district court to hold Mr. White indefinitely in contempt. Consequently, we reverse the portion of the 5 July 2012 order holding Mr. White in civil contempt.

Id. at 219–20, 817 S.E.2d at 868–69. Unlike *Kolczak* or *Wellons*, here the trial court did “clearly specify what [Father could] do to purge himself of contempt.” *Id.*

In the order on appeal, the trial court acknowledged the difficulty in constructing a purge condition in a contempt order for a refusal to

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comply with an order regarding visitation, which is always an ongoing obligation. Unlike *Kolzcak, id.*, here the trial court's order clearly sets forth exactly what Father needed to do to purge himself of contempt: he had to set up FaceTime on the children's iPad to allow Mother the communication with the children set out in the Custody Order. Since he could not personally accomplish this task while in jail, the trial court allowed him time to take the specific steps set out in the order. In this type of situation, the trial court must tailor the purge conditions to the needs of the particular case.

¶ 37 Here, the trial court postponed Father's time to report to the jail to April 12, 2019 to allow time for him to take "the necessary steps to purge himself of the contempt and thus come into compliance with the terms of the Custody Order." The trial court also set a time for a "review hearing" on April 10 to "hear briefly from the parties about the actions Father] has taken to purge himself of contempt."²

¶ 38 Father argues the trial court's order is internally contradictory because the order acknowledges that "if Father is in jail he cannot purge by complying" and to remedy the "apparent contradiction, the trial court 'delays' the report to jail date to allow him time to comply." But if Father had not complied with the purge condition by April 10, at the review hearing, Father would then go to jail and would have no ability to purge the contempt.

¶ 39 Although the trial court did allow Father the time to purge himself of contempt by setting up the children's iPad properly and thus avoid reporting to jail, the trial court's order is not internally contradictory. In fact, the trial court set out exactly what Father would need to do to purge the contempt and allowed him time to take these actions personally, but the order also noted that Father could "arrange for someone else to perform these tasks on his behalf." In this manner, the trial court's purge provisions are similar to those often imposed in civil contempt orders for nonpayment of child support. A contemnor may be held in civil contempt and imprisoned immediately, with a purge condition of payment of a sum of money. Once the contemnor is in jail, he must arrange for payment of the amount set as the purge condition to purge the contempt and be released from jail. If the contemnor has sufficient cash in his physical possession to pay the purge payment immediately,

2. The trial court rendered its order at the close of the hearing on 12 February 2019. In open court, the trial court informed the parties of the purge conditions and that Father would have "two months" to take the actions needed "to make it possible that [Mother] has contact with" the children. The written and signed Contempt Order was filed on 2 April 2019.

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he can immediately purge the contempt and not be imprisoned. But if the contemnor does not have sufficient cash in his physical possession to pay the purge payment and the contempt order directs that he be immediately taken into custody, he will be imprisoned and, in jail, he does not have the ability to personally go to get the funds to pay the purge payment—even if he has those funds readily available at home or in a bank account. But from jail, he can contact another person—a friend, a family member, his banker, or his attorney—to arrange for someone else to retrieve his funds and make the purge payment. In this respect, the trial court’s purge conditions here are quite similar to those commonly imposed in cases where a financial purge payment is ordered—though, unlike payment of past due child support, there is no way to quantify a loss of past visitation and no way to replace the missed communications between a parent and her children. The trial court noted this problem:

The Court recognizes that the purpose of civil contempt is to obtain compliance with a court order and that the only sanction for civil contempt is imprisonment until a defendant complies with that order. The Court also recognizes that [Father’s] present ability to comply with the terms of the Custody Order requires that [Father] be present in the home for a period of time to install FaceTime on the children’s iPad, ensure that it is functioning properly, and ensure that the children’s iPad is charged and connected to Wi-Fi (or arrange for someone else to perform these tasks on his behalf), and that [Father] must have actual possession of his phone in order to unblock Mother’s number and arrange a time for her to contact the children.

¶ 40 The trial court gave Father time to set up the children’s iPad properly before reporting to jail, and if he took the actions directed by the order, he would not have to report to jail. If he failed to take these actions personally and was imprisoned, he could still “arrange for someone else to perform these tasks on his behalf.” Either way, Father had the “present ability” to comply with the Custody Order and with the purge conditions in the Contempt Order. Thus, the order is not internally contradictory.

¶ 41 Father also argues that although paragraphs 5 “seems to say that April 10 is the day upon which purge is complete,” “paragraph 4 talks about an ongoing obligation. Essentially, paragraph 4 tells him to come into compliance and stay in compliance with the terms of the custody order.” In this regard, Father argues this order is like the order in

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Wellons and is thus improper. *See Wellons*, 229 N.C. App. at 182, 748 S.E.2d at 722. But we do not read the Contempt Order as requiring indefinite compliance with the Custody Order as a purge condition. Paragraph 4 simply sets out the specific conditions which would need to exist to allow the communications between Mother and the children as directed by the Custody Order, while paragraph 5 sets out the specific time for the review hearing, based upon the trial court's decision to *give Father the opportunity* to return to his home and set up the iPad personally. Apparently, Father did not appreciate the trial court extending him this opportunity and would have preferred immediate imprisonment, so he could then write a letter or make a phone call from jail to "arrange for someone else to perform these tasks on his behalf." But the trial court was within its discretion to give Father this opportunity to purge his contempt before having to report to jail.

E. Amending the Custody Order

- ¶ 42 [4] Father's last argument is that the "purge conditions improperly modify the parties' custody order." He contends:

In setting its purge conditions, the trial court required [Father] to unblock [Mother] from his phone. The court also required [Father] to arrange [Mother]'s FaceTime windows with [Mother]. The parties' custody order does require some communication (e.g. consultation on legal custody issues, notification of certain things), but the order does not require that the parties communicate by telephone. The order also does not provide that the parties must consult to determine when [Mother] can FaceTime the children. By requiring [Father] to unblock [Mother] from his phone and to engage in regular (daily?) communication with [Mother] to arrange each FaceTime event, the trial court improperly modified the parties' custody order, and those provisions of the order should be vacated.

- ¶ 43 Father is correct that the Custody Order did not set out exact times and methods for the "Unrestricted Telephone Communication" between the parties and children, but it did provide that "[e]ach party shall generally have unrestricted but reasonable telephone contact with the minor children. The parties agree to make the minor children available to the non-custodial parent for phone or FaceTime contact for fifteen minutes each evening." The purge conditions in the Contempt Order do not change this provision of the Custody Order but only set out the actions

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Father must take to purge the contempt by setting up the iPad in a manner to allow the reasonable contact directed by the Custody Order.

¶ 44 The purge provisions here are comparable to those in *Wilson v. Guinyard*, 254 N.C. App. 229, 801 S.E.2d 700 (2017). In *Wilson*, the mother lived in North Carolina and the father in South Carolina. *Id.* at 230, 801 S.E.2d at 702. The custody order provided for the parties to meet at “South of the Border Amusement Park” to exchange the child for visitation. *Id.* The order also set out times for the exchanges but required each party to notify the other of delays in travel “due to unforeseen circumstances.” *Id.* The mother filed a motion for contempt alleging the father was “habitually late” without valid reasons and on at least one instance the child missed a day of school after the father had missed a scheduled exchange. *Id.* at 231, 801 S.E.2d at 702. At the hearing, she presented evidence the father was late to over forty exchanges, sometimes up to two hours late. *Id.* at 231, 801 S.E.2d at 702–03. The trial court held the father in civil contempt and set as purge conditions that the “[d]efendant could purge himself of contempt by both picking up and dropping off their son in Durham for the next three weekend visits. The Court further provided that if the defendant was more than thirty minutes late to either pick up or drop off [the child], a weekend visitation would be forfeited.” *Id.* at 238, 801 S.E.2d at 706.

¶ 45 This Court held the purge conditions requiring the father to exchange the child at a different location than established by the custody order for “the next three weekend visits” and for forfeiture of a visit for being more than 30 minutes late was not a modification of the custody order:

These provisions do not constitute a modification of custody. *See Tankala v. Pithavadian*, __ N.C. App. __, __, 789 S.E.2d 31, 33 (2016) (holding a trial court’s order providing additional dates and locations for custodial visitation not inconsistent with the governing child custody order is not a modification of the terms of custody).

Permanent joint legal custody and secondary physical custody remained with Defendant both before and after the contempt order. These provisions more specifically identify what Defendant can and cannot do regarding the visitation times in order to purge himself of the civil contempt and insure [sic] Defendant’s compliance with the previous court orders. *See Cox*,

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133 N.C. App. at 226, 515 S.E.2d at 65; *Scott*, 157 N.C. App. at 394, 579 S.E.2d at 439. The trial court did not improperly modify custody or impose improper purge conditions.

Id.

¶ 46 As in *Wilson*, the trial court’s purge conditions set out requirements for Father to purge the civil contempt and the conditions are consistent with the Custody Order. *Id.* The purge provisions of the Contempt Order apply only until Father has taken the actions required to purge the contempt. The Contempt Order does not modify the Custody Order. This argument is without merit.

IV. Conclusion

¶ 47 The trial court acted reasonably and within its discretion. “The [Contempt O]rder provides flexibility for unusual circumstances . . . , which [Father] clearly and repeatedly abused.” *Wilson*, 254 N.C. App. at 237, 801 S.E.2d at 706. For the reasons discussed above, we affirm.

AFFIRMED.

Judges TYSON and COLLINS concur.

WILLIAM THOMAS FOX AND SCOTT EVERETT SANDERS, PLAINTIFFS

v.

THE CITY OF GREENSBORO; MITCHELL JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITIES; TIMOTHY R. BELLAMY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITIES; GARY W. HASTINGS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITIES; ERNEST L. CUTHBERTSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITIES; JOHN D. SLONE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITIES; NORMAN O. RANKIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITIES; AND MARTHA T. KELLY, INDIVIDUALLY AND IN HER OFFICIAL CAPACITIES, DEFENDANTS

No. COA20-438

Filed 21 September 2021

1. Malicious Prosecution—elements—malice—governmental immunity—lack of probable cause—criminal charges against policemen

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the doctrine

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of governmental immunity barred plaintiffs' malicious prosecution claim against a city official and other police officers (defendants) where plaintiffs—who accused defendants of providing false or misleading information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges, but who admitted during depositions that they lacked specific knowledge of what information defendants shared with the SBI—could not meet their burden of showing defendants acted with malice. Further, because there was substantial evidence supporting a probability that plaintiffs committed the crimes they were charged with, plaintiffs could not show defendants acted without probable cause in investigating those charges.

2. Conspiracy—civil—conspiracy to provide false information—criminal charges against policemen

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs' lawsuit against a city official and other police officers (defendants) properly dismissed plaintiffs' civil conspiracy claim, where plaintiffs accused defendants of agreeing to provide false information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges. North Carolina law does not recognize a cause of action for civil conspiracy to provide false statements in order to secure someone's arrest. Moreover, plaintiffs failed to allege specific facts regarding how or when defendants agreed to the purported conspiracy.

3. Statutes of Limitation and Repose—abuse of process—criminal charges against policemen—withholding exculpatory evidence—last tortious act

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, plaintiffs' abuse of process claim against a city official and other police officers (defendants) was not time-barred. Because the three-year limitations period for abuse of process claims commences upon the last tortious act complained of, and because plaintiffs alleged a number of continuous tortious acts by defendants following plaintiffs' arrest—such as withholding exculpatory evidence on plaintiffs' criminal charges and using the pending prosecution to try to force plaintiffs

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out of the police department—the limitations period on plaintiffs’ abuse of process claim began to run on the day that the last tortious act concluded.

4. Abuse of Process—sufficiency of pleadings—improper acts—ulterior motive—criminal charges against policemen—withholding exculpatory evidence

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs’ lawsuit against a city official and other police officers (defendants) improperly dismissed plaintiffs’ abuse of process claim. Plaintiffs sufficiently pleaded improper acts by defendants occurring after plaintiffs’ criminal prosecution began and sufficiently pleaded that defendants “acted with an ulterior motive” by withholding exculpatory evidence on plaintiffs’ charges in order to pressure them into leaving the police department.

Judge JACKSON concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 14 August 2012 by Judge Joseph Turner and order entered 18 December 2019 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 10 March 2021.

Morrow, Porter, Vermitsky, & Taylor, PLLC, by John C. Vermitsky, for Plaintiffs-Appellants.

Nelson Mullins Riley & Scarborough, LLP, by G. Gray Wilson, Stuart H. Russell, and Lorin J. Lapidus, for Defendants-Appellees.

WOOD, Judge.

¶ 1 Plaintiffs William Fox (“Fox”) and Scott Sanders (“Sanders”) (collectively, “Plaintiffs”) appeal two separate orders. Plaintiffs first appeal an order dismissing their civil conspiracy and abuse of process claims. Plaintiffs also appeal an order granting summary judgment in favor of Defendants with respect to their malicious prosecution cause of action. After careful review of the record and applicable law, we affirm in part and reverse in part.

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I. Factual and Procedural Background

¶ 2 In 1984, Defendant Mitchell Johnson (“Defendant Johnson”) became employed by the City of Greensboro. In early 2000, Defendant Johnson became the Deputy City Manager. While Defendant Johnson was the Deputy City Manager, the City Manager Ed Kitchen (“Kitchen”) asked Defendant Johnson “to review a letter from the NAACP expressing concerns” of racial misconduct within the Greensboro Police Department (“GPD”). In the summer of 2005, while Defendant Johnson’s review of the concerns raised was ongoing, Kitchen retired, and Defendant Johnson became the City Manager.

¶ 3 In 2005, Plaintiffs were law enforcement officers with the GPD. Plaintiffs were assigned to the “Special Intelligence Section” (“SIS”), a subdivision of the Special Investigations Division (“SID”) within the GPD. The SIS was “a unit designed to investigate, among other things, allegations of criminal police misconduct, outlaw motorcycle gangs, street gangs, dangerous persons, organized crime,” and to “protect celebrities or high risk targets visiting Greensboro, North Carolina.”

¶ 4 In or around June 2005, GPD Officer James Hinson (“Hinson”) and other African American officers raised concerns that Chief of Police David Wray (“Chief Wray”) and “a group of Caucasian officers coined the ‘Secret Police’ ” were racially targeting African American police officers. Hinson alleged the SIS, including Plaintiffs, were involved in the “Secret Police.”

¶ 5 The allegations of racial discrimination and targeting centered around the SIS’s use of an alleged “Black Book.” The “Black Book” was a black binder containing pictures of nineteen African American officers and various male African American individuals allegedly used “as part of an effort to target African American police officers for criminal investigations.” The SIS asserted that the “Black Book” was a legitimate investigative tool being used to investigate an allegation of sexual assault by an on-duty African American officer. The “Black Book” contained photographs of minority male officers who were on-duty during the alleged sexual assault of an informant.

¶ 6 Due to the allegations of racial misconduct, Defendant Johnson asked Chief Wray about the NAACP’s concerns and the existence of the Black Book. Chief Wray’s written response led Defendant Johnson to “believe that [Wray] denied the existence of anything matching the description of the ‘Black Book.’ ” Defendant Johnson reported to the NAACP that the “Black Book” did not exist.

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¶ 7 In August 2005, Defendant Johnson attended a meeting with African American GPD officers at their request. During this meeting, Defendant Johnson heard the officers' concerns regarding the Wray administration. Around this time, Defendant Johnson also learned of concerns regarding the SID from the State Bureau of Investigation ("SBI"). Due to repeated concerns regarding the GPD, Defendant Johnson contacted City Attorneys "to find an outside entity to review the conduct of the Wray administration to determine if there was any truth to the concerns." The City's legal department ("City Legal"), in response, recommended Risk Management Associates ("RMA"), an independent consulting company, to review the Wray administration. Defendant Johnson hired RMA to "review the conduct of the . . . Wray [a]dministration[.]" but "did not ask RMA to investigate any particular individual."

¶ 8 While the RMA investigation was ongoing, Defendant Johnson "had the legal department of the City of Greensboro investigate general administrative issues in the GPD." The RMA report caused Defendant Johnson to believe Chief Wray "had not been truthful about the 'Black Book' and raised other serious concerns about the leadership of the [GPD]." As a result, Defendant Johnson then "chose to place Wray on administrative leave" on January 6, 2006. At that time, Defendant Timothy Bellamy ("Defendant Bellamy"), the Assistant Chief of Police, became the interim Chief of Police. Shortly after Chief Wray was placed on administrative leave, he resigned as Chief of Police on January 9, 2006.¹ After Chief Wray's resignation, Defendant Bellamy was tasked with reviewing the RMA and City Legal reports.

¶ 9 Upon his review of the RMA report, Defendant Bellamy had "very serious concerns about the leadership of the Wray administration." According to the report, Officer Randall Brady ("Brady") revealed to the RMA that "he was keeping in the trunk of his police car a book that matched the description of the 'Black Book.'" According to Sanders, Brady secured the "Black Book" in the trunk of his patrol vehicle to avoid speculation that the "Secret Police" were showing the "Black Book" to a variety of individuals in an effort to incriminate minority officers.

¶ 10 Upon securing the "Black Book" from Brady's trunk, Defendant Bellamy gave the "Black Book" to Internal Affairs ("IA"). IA then began its investigation. Thereafter, Defendant Bellamy assigned Captain Gary Hastings ("Defendant Hastings") "with the task of securing and

1. The Federal Bureau of Investigation ("FBI") began an investigation of the Wray administration on January 12, 2006. The FBI did not substantiate any violation of civil rights or federal law.

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reviewing materials within [SID] . . . for possible criminal activity.” Defendant Hastings “put together a team” of officers from the Criminal Investigation Division (“CID”) to review the activity of the SID and Wray administration.

¶ 11 While Defendant Hastings was investigating the SID, Defendant Bellamy met with Guilford County District Attorney Doug Henderson (“Henderson”) about the RMA report and Defendant Hastings’s investigative findings. Henderson informed Defendant Bellamy that the Guilford County District Attorney’s Office could not participate in the investigation and that the North Carolina Attorney General’s Office would need to be contacted about the concerns regarding alleged criminal conduct within the GPD.

¶ 12 Henderson drafted a letter to Assistant Attorney General James Coman (“Coman”) in March 2006. Henderson also wrote a letter to the Director of the SBI, requesting a criminal investigation of the Wray administration on March 13, 2006. On April 4, 2006, Coman responded to Henderson, “accepting responsibility to determine whether or not a criminal investigation should be undertaken by the [SBI].” Coman and a Special Deputy Attorney General traveled to Greensboro throughout April and May 2006 to review police reports and tapes. On June 9, 2006, a meeting was held at the SBI District Office in Greensboro, where it was determined the SBI would mount an investigation of the Wray administration.

¶ 13 Throughout the SBI investigation, agents met with and interviewed approximately seventy-five individuals, including Plaintiffs and Defendants Johnson, Bellamy, and Hastings. Agents also reviewed “69 CDs of audio recordings that were retrieved from Detective Scott Sanders’ city computer and other sources.” One witness, Dana Bailey (“Bailey”), discussed how Sanders asked her to create lineups of male African American officers.

¶ 14 Bailey was employed by the GPD in 2000 and worked as an investigative specialist. In or around January 2003, Sanders asked Bailey to put together lineups consisting of five officers. Bailey believed the officers were Hinson, Snipes, Wallace, Fulmore and Norman Rankin (“Defendant Rankin”). Bailey stated her lineups were created using Department of Motor Vehicles (“DMV”) photographs, and she cropped any photograph of an officer in uniform “so it looked similar to others in the lineup.”

¶ 15 In January 2005, Sanders asked Bailey to put together a list of every officer who had worked on a particular date and shift. Bailey did so, and Sanders requested “16 or 17 more lineups,” and told her “the request

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was by the authority of Deputy Chief Brady.” Bailey created the lineups, and she mentioned in her SBI interview that “all of the officers she did lineups on were black.” Sanders did not mention what the lineups were for, nor did Bailey “want to know what they were for.” During the investigation of the GPD, Bailey reported some computers were taken for investigation, but one of hers was not. “[I]t bothered [Bailey] that a complete investigation would not be done if that computer was not taken and looked at.”

¶ 16 Defendant Hastings was also interviewed by the SBI. Defendant Hastings’s interview revealed Defendant Bellamy “designated Hastings as the operational commander for the inventory, review, and analysis of the seized property belonging to the [SID].” Defendant Hastings “was made the commander for any subsequent criminal investigation involving any allegation or evidence of a crime.” Defendant Hastings stated the CID “seized a ‘ton’ of stuff including electronic media, such as audio cassette tapes, VHS tapes, other video tapes, recordable CDs, computer drives, cellular telephones, and recordable DVDs.” While Defendant Hastings was investigating the SID, Defendant Bellamy re-assigned members of the SIS and SID to other divisions.

¶ 17 While Defendant Hastings and his team were reviewing the materials seized from the SID, Defendant Hastings “recalled that one of his homicide detectives, [Defendant Rankin], had been transferred from his division to Special Intelligence.” Defendant “Hastings ha[d] received information that Officer John Sloan² [sic] (“Defendant Slone”) had been instructed to keep [Defendant Rankin] busy in some investigation that he had been assigned to handle.” Defendant Hastings “suspected [Defendant] Rankin was placed in Special Intelligence and assigned some investigation as window-dressing to offset the perception that black officers in that unit were not allowed to investigate other officers.”

¶ 18 Defendant Rankin was also interviewed during the SBI investigation. Brady assigned Defendant Rankin to the SID to work on a special assignment on June 23, 2005. Defendant Rankin was tasked with investigating “a sensitive matter,” involving an informant. When Brady assigned Defendant Rankin to the SID, he called Fox and Ernest Cuthbertson (“Defendant Cuthbertson”) to help investigate the case. During this meeting, Brady “made some comment about [Sanders] being tied up on the . . . Hinson investigation and some other things and that was why he needed to assign the case to [Defendants] Rankin and Cuthbertson.”

2. Throughout the record, Defendant Slone is referred to as “Sloan.” It appears from the complaint and the parties’ briefing that the appropriate spelling is “Slone.”

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¶ 19 Defendant Rankin was assigned to investigate allegations that certain GPD officers solicited prostitutes. Defendant Rankin was instructed to contact Sanders because Sanders had additional information about the case. Defendant Rankin did so, and Sanders provided him with names and contact information. The allegations regarding prostitution came from an informant who went by the name “CC.” Defendant Rankin recalled CC would only speak with Defendant Slone.

¶ 20 Defendants Slone and Rankin discussed CC, and why CC was important to the investigation. Defendant Slone later told Defendant Rankin that “Sloan [sic] had been instructed to lead [Defendants] Rankin and Cuthbertson in the wrong direction and give them false information to keep them from ever meeting with [the informant].”

¶ 21 In his SBI interview, Defendant Slone discussed a phone call he received from Sanders. Sanders told Defendant Slone the SID was not working the investigation, but Chief Wray had assigned Defendants Rankin and Cuthbertson to investigate the case. Defendant Slone detailed a meeting he had with Plaintiffs, where Plaintiffs expressed concerns regarding Defendants Rankin and Cuthbertson’s competency. Defendant Slone was led to believe “by Brady, Fox, and Sanders” that Defendants Cuthbertson and Rankin were “dirty cops.” According to Defendant Slone, he was assigned to work the case, and was tasked with ensuring Defendants Rankin and Cuthbertson did not obtain certain evidence. Defendant Slone also told SBI agents that Plaintiffs were to be blind copied on any e-mails between Defendants Slone, Rankin, and Cuthbertson.

¶ 22 Winston-Salem law enforcement officer Theodore Hill (“Hill”) corroborated Defendant Slone’s statements.³ Hill recounted a meeting he attended with Defendant Slone and two detectives at a gas station parking lot. “Hill related that [Defendant Slone] was trying to give the other detectives some information he had obtained,” but the detectives “did not want it because if they took the information, they would have to give it to whoever was working on some case.” Hill recalled the information Defendant Slone was trying to give to the detectives “was supposed to be a picture of a police officer with a stripper or someone else.”

¶ 23 Defendant Slone and Hill’s statements to the SBI are further corroborated by Defendant Rankin’s interview. Defendant Rankin was

3. Fox filed “truthfulness concerns” regarding Defendant Slone, alleging Defendant Slone’s statements were inconsistent. GPD Sergeant Mike Loy (“Loy”), working in IA, drafted a memorandum regarding Defendant Slone’s inconsistent statements. Notably, Defendant Slone’s statements are corroborated, in part, by Hill and Defendant Rankin.

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assigned to investigate allegations of police officers soliciting prostitutes. After Defendant Rankin received his assignment, he thought “it was like an invisible wall was being put up to keep him from talking to” the informant. Later, Defendant Slone admitted to Defendant Rankin he was asked to “lead [Defendants] Rankin and Cuthbertson in the wrong direction and give them false information to keep them from ever meeting with the informant.”

¶ 24 Fox also participated in the SBI investigation. Fox denied knowing Sanders was getting blind copies of e-mails between officers and claimed he was led to believe CC “and [Defendant Rankin] did not get along.” He further denied “setting [Defendant] Rankin up to fail.”

¶ 25 Throughout their investigation, SBI agents became concerned that Plaintiffs obstructed investigations and unlawfully accessed a federal government computer. Specifically, the agents were concerned Sanders accessed a federal computer assigned to officer Julius Fulmore (“Fulmore”).

¶ 26 Fulmore had been assigned a laptop computer by an agent of the Department of Housing and Urban Development (“HUD”) and used the laptop until June 4, 2004. Fulmore did not allow any other officer to use the computer, and it was in his sole possession. Fulmore told SBI agents that Sanders went to the HUD agent for consent to search the HUD laptop twice. The HUD agent did not consent to a search and told Sanders he would need Fulmore’s permission or a letter from Sanders’s supervisor requesting permission to access the computer. Fulmore did not consent to any individual searching the HUD computer and the record does not reveal a request from Sanders or his supervisor for permission to access the laptop.

¶ 27 On December 20, 2003, Sanders asked SBI agent Gary Rick Cullop (“Cullop”) to examine a computer for him. Cullop stated he removed the hard drive from the computer and made a “mirror copy” of the hard drive. According to Cullop’s SBI interview, “he did not know by what consent he searched the computer for Sanders.” Cullop believed “someone in Sanders’ chain of command gave permission for the search.” Cullop did not know the computer was owned by HUD and the federal government.

¶ 28 On September 18, 2006, the SBI agents investigating the Wray administration presented Cullop with a computer. The computer SBI agents presented to Cullop was the same computer given to Fulmore by the

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HUD agent. Cullop confirmed that the computer he inspected for Sanders was the same computer presented to him on September 18, 2006.⁴

¶ 29 On September 17, 2007, Sanders was indicted for one count of accessing a government computer in violation of N.C. Gen. Stat. § 14-454.1(b); felonious obstruction of justice; and felonious conspiracy “to undermine a legitimate criminal investigation.” That same day, Fox was indicted for felonious obstruction of justice and felonious conspiracy to obstruct justice. Plaintiffs were arrested on September 21, 2007.⁵ Consequently, Plaintiffs were suspended without pay and were instructed not to issue any comments regarding the investigation.

¶ 30 Sanders’s criminal trial for one count of accessing a government computer began on February 16, 2009. During Sanders’s trial, Defendant Hastings testified on his behalf and was believed to be a beneficial witness for Sanders. Four days later, Sanders was acquitted of accessing a government computer. The remaining charges against both Plaintiffs were dismissed on February 23, 2009.⁶

¶ 31 On April 1, 2011, Plaintiffs brought suit against the City of Greensboro; Defendants Bellamy, Hastings, Slone, Cuthbertson, Johnson, and Martha Kelly (“Defendant Kelly”); and the RMA in the federal district court for the Middle District of North Carolina. The District Court dismissed all of Plaintiffs’ asserted causes of action, upon motion by the named defendants, on August 27, 2011. *See Fox v. City of Greensboro, et al.*, 807 F. Supp. 2d 476 (M.D.N.C. 2011).

¶ 32 On January 20, 2012, Plaintiffs filed suit against Defendants Johnson, Bellamy, Hastings, Kelly,⁷ Slone, Rankin, and Cuthbertson in Forsyth County Superior Court (collectively, “all Defendants”). Plaintiffs asserted a civil conspiracy cause of action against all Defendants in both

4. Cullop was able to confirm the computer presented by the SBI agents was the same computer he examined for Sanders by matching the serial number from the computer to his notes.

5. Plaintiffs speculate that former Attorney General Roy Cooper, judges, politicians, and the SBI’s political motivations caused Coman to seek criminal indictments.

6. Coman’s affidavit demonstrates he “told the attorneys for Sanders and Fox that if Sanders was acquitted, [Coman] would drop all remaining criminal charges against Sanders and Fox.” Plaintiffs’ attorney, Seth Cohen, submitted an affidavit corroborating this statement.

7. We need not address the merits of Plaintiffs’ claims regarding Defendant Kelly. Plaintiffs voluntarily dismissed their claims against Defendant Kelly on October 8, 2018. *See Hous. Auth. of City of Wilmington v. Sparks Eng’g. PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011).

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their official and individual capacities. Plaintiffs further alleged abuse of process and malicious prosecution causes of action against Defendants Johnson, Bellamy, Hastings, and Kelly in both their official and individual capacities. Plaintiffs asserted additional claims for declaratory judgment and punitive damages.

¶ 33 Plaintiffs allege Defendant Johnson wrongfully ordered the investigation of Plaintiffs, directed City Attorneys to lie to Plaintiffs, controlled the flow of information to the SBI, instigated Plaintiffs' arrest, and failed to provide the SBI with exculpatory information. It was further alleged Defendant Johnson provided City Council with false and misleading information about the "Black Book," and improperly provided the media and public with false and misleading information.⁸

¶ 34 Regarding Defendant Bellamy, Plaintiffs contend he "help[ed] to create false accusations that [Plaintiffs] were wrongfully targeting minority officers"; controlled the flow of information to the RMA, City Attorneys, and SBI; and provided false and misleading information during the multiple investigations of the Wray administration. According to Plaintiffs' complaint, Defendant Bellamy "helped to create a false transcript" of an audio recording between Sanders, Wray, and others; failed to provide exculpatory information regarding Plaintiffs' criminal charges; and "[failed] to timely act to investigate . . . truthfulness allegations" that Defendant Slone provided false information during the investigations.

¶ 35 Defendant Hastings was accused of aiding in the creation of false accusations against Plaintiffs; "[a]uthoring memorandum accusing [Plaintiffs] of illegal and immoral conduct"; instructing Defendant Kelly to destroy memoranda regarding the investigation of Plaintiffs; and helped to create a false transcript of an audio recording involving Sanders. Plaintiffs further alleged Defendant Hastings provided false and misleading information to City Council and police personnel.

¶ 36 Plaintiffs contend Defendants Slone, Rankin, and Cuthbertson participated in creating false accusations against Plaintiffs, and knowingly provided the RMA and SBI with false or misleading information during the investigations of the Wray administration. It was further alleged that Defendant Kelly, a GPD Captain, knew of the false information provided during the SBI investigation and failed to take appropriate action.

8. Throughout the investigations of the Wray administration, Defendants Johnson and Bellamy engaged in press releases regarding the "Black Book." Plaintiffs contend the statements made to the press, as well as statements made to City Council, were inflammatory, misleading, and false. Plaintiffs further contend these statements played a role in the SBI investigation and the decision to criminally indict Plaintiffs.

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Defendant Kelly was further accused of destroying memoranda regarding the investigations, including a memorandum referred to as “Memo 9.” Memo 9 allegedly “contained exculpatory evidence that [Plaintiffs] had not acted improperly.”

¶ 37 All Defendants moved to dismiss Plaintiffs’ complaint for improper venue, failure to state a claim upon which relief can be granted, and failure to comply with Rule 9 of our rules of civil procedure. The case was transferred to Guilford County Superior Court by consent order in March 2012.

¶ 38 The Guilford County Superior Court granted all Defendants’ motion to dismiss in part, dismissing Plaintiffs’ civil conspiracy and abuse of process claims on August 13, 2012. The trial court denied Defendants Johnson, Bellamy, and Hastings’s motion to dismiss Plaintiff’s malicious prosecution cause of action. Plaintiffs appealed to this Court on September 13, 2012.

¶ 39 Plaintiffs’ appeal was dismissed as interlocutory on October 1, 2013.⁹ See *Fox v. City of Greensboro*, No. 13-171-2, 2013 N.C. App. LEXIS 1321 (N.C. Ct. App. Dec. 17, 2013). Plaintiffs filed a petition for discretionary review with the North Carolina Supreme Court on January 21, 2014. This petition was denied in April 2014.

¶ 40 Defendants Johnson, Bellamy, Hastings, and Kelly moved for judgment on the pleadings on the basis of collateral estoppel in the Guilford County Superior Court on August 4, 2014. These Defendants contended Plaintiffs’ malicious prosecution claim was barred by the doctrine of collateral estoppel “given the final judgment in the prior case *Fox v. City of Greensboro*, 807 F. Supp. 2d 476 (M.D.N.C. 2011).” This motion was denied.

¶ 41 On October 16, 2014, Defendants Johnson, Bellamy, Hastings, and Kelly appealed to this Court. This Court issued its opinion on October 6, 2015, holding, “Plaintiffs are not collaterally estopped from bringing their malicious prosecution claims under state law.” *Fox v. Johnson*, 243 N.C. App. 274, 288, 777 S.E.2d 314, 325 (2015). These Defendants petitioned our Supreme Court for discretionary review on November 9, 2015. The petition for discretionary review was denied on January 28, 2016. On May 12, 2016, this case was designated as exceptional pursuant

9. Plaintiffs’ appeal was originally heard on August 13, 2013, and an opinion was filed on October 1, 2013. Plaintiffs filed a petition for rehearing on November 1, 2013, which was allowed on November 21, 2013. On December 17, 2013, a superseding opinion was issued, dismissing Plaintiffs’ appeal as interlocutory.

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to Rule 2.1(a) of the General Rules of Practice. Thereafter, the parties engaged in discovery.

¶ 42 Plaintiffs and Defendants Johnson, Bellamy, Hastings, and Kelly were deposed. Sanders conceded in his deposition that he had “no personal knowledge of any discussion or conversation any defendant had with anyone at the SBI,” other than reading through their SBI interviews “after the fact.” Sanders further conceded that he “had no personal knowledge of any of these [D]efendants” instructing other law enforcement officers “not to provide information to the SBI.” When asked about the contents of Memo 9, Sanders admitted he did not know if it related to the criminal charges brought against him.

¶ 43 During Fox’s deposition, he conceded he did not know the contents of Memo 9, and he “[did not] know what that memo had to do with.” Fox testified he had “very little contact” with Defendants Bellamy and Hastings. Fox conceded that he did not believe “the charges were personal against [him,]” but that the charges “were just a means to an end.” Further, Fox stated his belief that Defendant Hastings’s “actions or motivation was prompted by [Hastings’s] relationship with Wray.”

¶ 44 Defendants Johnson, Bellamy, and Hastings moved for summary judgment with respect to Plaintiffs’ malicious prosecution claim in July 2019. The trial court granted this motion on November 6, 2019. Plaintiffs appealed on December 31, 2019.

II. Discussion

¶ 45 Plaintiffs raise several arguments on appeal, each will be addressed in turn.

A. Motion for Summary Judgment

¶ 46 **[1]** Plaintiffs first contend the trial court erred in granting summary judgment in favor of Defendants Johnson, Bellamy, and Hastings with respect to Plaintiffs’ malicious prosecution cause of action. Defendants Johnson, Bellamy, and Hastings contend Plaintiffs’ claim is barred by the affirmative defense of governmental immunity.

¶ 47 We review the “grant of a motion for summary judgment . . . [to determine] whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law.” *Becker v. Pierce*, 168 N.C. App. 671, 674, 608 S.E.2d 825, 828 (2005) (quoting *Hoffman v. Great Am. Alliance Ins. Co.*, 166 N.C. App. 422, 425, 601 S.E.2d 908, 911 (2004)).

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A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.

Hoffman, 166 N.C. App. at 424-26, 601 S.E.2d at 911 (internal quotation marks and citations omitted). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021).

In order to support a malicious prosecution claim, [a] plaintiff must establish the following four elements: “(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff.”

Martin v. Parker, 150 N.C. App. 179, 182, 563 S.E.2d 216, 218 (2002) (quoting *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994)); see also *Cook v. Lanier*, 267 N.C. 166, 169, 147 S.E.2d 910, 914 (1966). “In cases for malicious prosecution in which the earlier proceeding is civil, rather than criminal, in nature, our courts require a plaintiff to additionally plead and prove a fifth element: ‘special damages.’” *Fuhs v. Fuhs*, 245 N.C. App. 367, 372, 782 S.E.2d 385, 388 (2016).

¶ 48

Here, the parties do not dispute the “earlier proceeding” terminated “in favor of the plaintiff,” as Sanders was acquitted of accessing a federal computer and the remaining charges against Plaintiffs were dismissed. Nor do the parties dispute that the earlier proceeding was criminal in nature. Thus, our review is limited to the remaining elements.

1. Governmental Immunity

¶ 49

Because Defendants Johnson, Bellamy, and Hastings contend Plaintiffs' malicious prosecution and civil conspiracy claims are barred

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by the affirmative defense of governmental immunity, we first determine whether these Defendants acted with malice. *See Lambert v. Town of Sylva*, 259 N.C. App. 294, 301, 816 S.E.2d 187, 193 (2018) (“Governmental immunity is an affirmative defense.”); *see also Turner v. City of Greenville*, 197 N.C. App. 562, 566, 677 S.E.2d 480, 483 (2009). “An affirmative defense is a defense that introduces a new matter in an attempt to avoid a claim, regardless of whether the allegations of the claim are true.” *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 37 (2008) (quoting *Williams v. Pee Dee Elec. Membership Corp.*, 130 N.C. App. 298, 301-02, 502 S.E.2d 645, 647-48 (1998)).

¶ 50 “Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function.” *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993) (citations omitted). When individual officers are named as defendants, the action “is one against the State for the purposes of applying the doctrine of sovereign immunity.” *Houpe v. City of Statesville*, 128 N.C. App. 334, 341, 497 S.E.2d 82, 87 (1998). “[T]he actions of a city and its officials in investigating and disciplining a city police officer accused of criminal activity are likewise encompassed within the rubric of ‘governmental functions.’” *Id.* at 341, 497 S.E.2d at 87.

¶ 51 While police officers are “public officials” for the purposes of governmental immunity, they “are not shielded from liability if their alleged actions were corrupt or malicious” *Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988) (citations omitted); *see also Strickland*, 194 N.C. App. at 10, 669 S.E.2d at 67; *Cline v. James Bane Home Bldg., LLC.*, 278 N.C. App. 12, 2021-NCCOA-266, ¶26 (“Public official’s immunity precludes suits against public officials in their individual capacities and protects them from liability ‘[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption’” (citation omitted)). “[A]n official may be held liable when he acts maliciously or corruptly, when he acts beyond the scope of his duties, or when he fails to act at all.” *Turner*, 197 N.C. App. at 566, 677 S.E.2d at 483 (citation omitted). Thus, only tortious “actions that are malicious, corrupt, or outside the scope of official duties will pierce the cloak of official immunity.” *Id.* (citation, internal quotation marks, brackets, and ellipsis omitted). “[I]f the plaintiff alleges an intentional tort claim, a determination of governmental immunity is unnecessary since, in such cases, neither a public official nor a public employee is immunized from suit in his individual capacity.”

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Beck v. City of Durham, 154 N.C. App. 221, 230, 573 S.E.2d 183, 189 (2002) (citation, internal quotation marks, and brackets omitted).

¶ 52 A plaintiff alleging malicious or intentional acts by a governmental official faces a high bar:

It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence. Moreover, evidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise.

Strickland, 194 N.C. App. at 10-11, 669 S.E.2d at 68 (citations, internal quotation marks, and brackets omitted.) Thus, to determine whether Plaintiffs' malicious prosecution claim against Defendants Johnson, Bellamy, and Hastings in their official capacities is barred under the doctrine of government immunity, we must first determine whether Defendants Johnson, Bellamy, and Hastings acted with malice.

¶ 53 "In order to give a cause of action for malicious prosecution, such prosecution must have been maliciously instituted." *Cook*, 267 N.C. at 170, 147 S.E.2d at 914 (citations omitted). " 'Malice' in a malicious prosecution claim may be shown by offering evidence that defendant 'was motivated by personal spite and a desire for revenge' or that defendant acted with 'reckless and wanton disregard' for plaintiffs' rights." *Becker*, 168 N.C. App. at 676, 608 S.E.2d at 829 (citation omitted); see also *Moore v. City of Creedmoor*, 345 N.C. 356, 371, 481 S.E.2d 14, 24 (1997) (citation omitted).

¶ 54 Plaintiffs must "offer evidence tending to prove that the wrongful action of instituting the prosecution was done for actual malice in the sense of personal ill-will, or under the circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of [Plaintiffs'] rights." *Mathis v. Dowling*, 230 N.C. App. 311, 316, 749 S.E.2d 284, 288 (2013) (citation omitted). "In an action for malicious prosecution, the malice element may be satisfied by a showing of either actual or implied malice. Implied malice may be inferred from want of probable cause in reckless disregard of the plaintiff's rights."

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Kirschbaum v. McLaurin Parking Co., 188 N.C. App. 782, 789-90, 656 S.E.2d 683, 688 (2008) (quoting *Nguyen v. Burgerbusters, Inc.*, 182 N.C. App. 447, 452, 642 S.E.2d 502, 506-07 (2007)).

Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest, e.g., to enforce collection of a debt is admissible both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a *prima facie* want of probable cause.

Cook, 267 N.C. at 170, 147 S.E.2d at 914 (citation, internal ellipses, and alteration omitted).

¶ 55 Here, Plaintiffs contend Defendants Johnson, Bellamy, and Hastings acted with ill-will by “with[holding] exculpatory evidence from the SBI in an effort to incite criminal charges against Plaintiffs”; “destroy[ing] exculpatory evidence”; “manipulating the ‘black book’ by providing a modified version to the SBI”; and providing false or misleading statements to the SBI, media, and to fellow law enforcement officers.

¶ 56 A review of the record, however, demonstrates that Plaintiffs lack specific knowledge of what information Defendants Johnson, Bellamy, and Hastings provided to the SBI. Specifically, Sanders conceded in his deposition that he had “no personal knowledge of any discussion or conversation any defendant had with anyone at the SBI,” other than reading through their SBI interviews “after the fact.” Sanders further conceded that he “had no personal knowledge of any of these defendants” instructing other law enforcement officers “not to provide information to the SBI.” Assuming *arguendo* that there were inconsistencies in Defendants Johnson, Bellamy, and Hastings’s SBI, IA, and RMA interviews, Plaintiffs failed to establish these inconsistencies were intentional and not mere misstatements over the course of an approximately two-year long investigation.

¶ 57 Further, Plaintiffs thought Chief Wray was “the real target of the SBI’s investigation.” Fox testified during his deposition that he had “very little contact,” with Defendants Bellamy and Hastings. Fox conceded that he did not believe “the charges were personal against [him,]” but that the charges “were just a means to an end.” Further, Fox stated his belief that Defendant Hastings’s “actions or motivation was prompted by [Defendant Hastings’s] relationship with Wray.” Moreover, Defendant Hastings testified in Sanders’s criminal trial, and was found to be “a helpful witness” for Sanders.

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¶ 58 Notably, Plaintiffs do not argue the actions taken by Defendants Johnson, Bellamy, and Hastings were against departmental policy or standard procedure where there are concerns of racial and criminal misconduct within a police department. While Plaintiffs take issue with their suspension; a “gag order,” that prevented them from speaking about their pending criminal charges; and statements made during several investigations, Plaintiffs do not argue this was an unusual response to public concerns of corruption and racial misconduct. Because Plaintiffs failed to show any statement was made maliciously, “in the sense of personal ill-will,” we find Plaintiffs’ malicious prosecution claim against Defendants Johnson, Bellamy, and Hastings in their official capacities is barred by the doctrine of governmental immunity.

2. Probable Cause

¶ 59 “Where the claim is one for malicious prosecution, probable cause has been properly defined as the existence of such facts and circumstances, known to the defendants at the time, as would induce a reasonable man to commence a prosecution.” *Best*, 337 N.C. at 749, 448 S.E.2d at 510 (internal quotation marks, alterations, and citations omitted); *see also Cook*, 267 N.C. at 170, 147 S.E.2d at 914 (citation omitted). “Whether probable cause exists is a mixed question of law and fact,” however, “the existence of probable cause is a question of law for the court.” *Best*, 337 N.C. at 750, 448 S.E.2d at 510 (citing *Cook*, 367 N.C. at 171, 147 S.E.2d at 914).

¶ 60 To determine probable cause, we must consider “whether a man of ordinary prudence and intelligence under the circumstance would have known that the charge had no reasonable foundation.” *Wilson v. Pearce*, 105 N.C. App. 107, 113-14, 412 S.E.2d 148, 151 (1992) (citation omitted). “The critical time for determining whether or not probable cause existed is when the prosecution begins.” *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 521, 397 S.E.2d 347, 349 (1990) (citation omitted). The existence of probable cause will defeat a malicious prosecution claim. *Adams v. City of Raleigh*, 245 N.C. App. 330, 335, 782 S.E.2d 108, 113 (2016). “Probable cause does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.” *Id.* at 337, 782 S.E.2d at 114 (internal quotation marks and citation omitted). “A probability of illegal activity . . . is sufficient.” *Id.* (citation omitted).

¶ 61 Here, there was substantial evidence to support a “probability” that Sanders had impermissibly accessed a government computer. While Plaintiffs contend all Defendants provided false and misleading information during the SBI investigation, Plaintiffs do not contest Cullop’s

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assertions that Sanders asked Cullop to make a “mirror copy” of a laptop computer. Nor do Plaintiffs argue Cullop’s notes regarding the serial number of the laptop he examined are inaccurate. Further, the HUD agent that allowed Fulmore to use the laptop in question made several statements to the SBI regarding Sanders’s requests to access Fulmore’s computer. Moreover, Sanders conceded in his IA interview that he “placed [a] monitoring device[]” on a city computer. Sanders further stated he put a “key-catcher” device on two officers’ computers, in order to capture these officers’ usernames and passwords.

¶ 62 There was also evidence presented that would lead “a man of ordinary prudence and intelligence” to believe Plaintiffs obstructed justice and conspired to do so. Defendant Slone stated in his SBI interview Sanders had instructed him not to provide certain evidence to Defendant Rankin during a meeting between Defendant Slone and Plaintiffs. While Plaintiffs argue this statement was false, misleading, and inconsistent with Defendant Slone’s statements during the IA and RMA investigations, Hill corroborated Defendant Slone’s statements. Hill recounted the meeting he attended with Defendant Slone and two detectives. “Hill related that [Defendant Slone] was trying to give the other detectives some information he had obtained,” but the detectives “did not want it because if they took the information, they would have to give it to whoever was working on some case.” Hill recalled the information Defendant Slone was trying to give to the detectives “was supposed to be a picture of a police officer with a stripper or someone else.”

¶ 63 Defendant Slone and Hill’s statements to the SBI are further corroborated by Defendant Rankin’s interview. Defendant Rankin was assigned to investigate allegations of police officers soliciting prostitutes. After Defendant Rankin received his assignment, he thought “it was like an invisible wall was being put up to keep him from talking to” an informant. Later, Defendant Slone admitted he was asked to “lead [Defendants] Rankin and Cuthbertson in the wrong direction and give them false information to keep them from ever meeting with the informant.”

¶ 64 Based upon Defendants Slone and Rankin’s statements to the SBI, corroborated in part by Hill, “a reasonable and prudent man, under the circumstances” would believe the obstruction of justice charge was not without a foundation. Our review reveals Plaintiffs failed to meet their burden to show that Defendants Johnson, Bellamy, and Hastings acted with malice or without probable cause. We hold the trial court did not err by granting summary judgment with respect to Plaintiffs’ malicious prosecution cause of action.

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B. Motion to Dismiss

¶ 65 Plaintiffs contend that the trial court erred in granting Defendants' motions to dismiss their civil conspiracy and abuse of process claims. We review an order granting a motion to dismiss *de novo*. *S.N.R. Mgmt. Corp. v. Danube Partners, 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). We consider "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Chidnese v. Chidnese*, 210 N.C. App. 299, 304, 708 S.E.2d 725, 730 (2011).

¶ 66 As a preliminary matter, we note, "North Carolina is a notice pleading state." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation omitted).

Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine *res judicata*, and to show the type of case brought."

Sutton v. Duke, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (citation and internal alteration omitted); *see also Hill v. Perkins*, 84 N.C. App. 644, 647, 353 S.E.2d 686, 688 (1987). Under our State's notice theory of pleading, plaintiffs must allege facts, not mere conclusions, to support their asserted causes of action. *See Sutton*, 277 N.C. at 98-99, 176 S.E.2d at 163. "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)." *Raritan River Steel Co. v. Cherry, Bekart, & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) (citation omitted). However, "if a complaint pleads facts which serve to defeat the claim it should be dismissed." *Id.* (citing *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166).

3. Civil Conspiracy

¶ 67 [2] Plaintiffs contend the trial court erred in dismissing their civil conspiracy cause of action against Defendants Johnson, Bellamy, Hastings, Kelly, Slone, Rankin, and Cuthbertson. Specifically, Plaintiffs contend they sufficiently alleged the cause of action under Rule 8 of our rules of civil procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 8(a) (2021). All Defendants contend that if Plaintiffs sufficiently pled factual allegations to survive a motion to dismiss, Plaintiffs' civil conspiracy claim is barred by the doctrines of intra-corporate or government immunity.

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¶ 68

We note “that there is not a separate civil action for civil conspiracy in North Carolina.” *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (citing *Shope v. Boyer*, 268 N.C. 401, 404-05, 150 S.E.2d 771, 773-74 (1966); *Fox v. Wilson*, 85 N.C. App. 292, 300, 354 S.E.2d 737, 742-43 (1987)).

In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all.

Shope, 268 N.C. at 405, 150 S.E.2d at 773-74 (citation omitted); *Fox*, 85 N.C. App. at 301, 354 S.E.2d at 743 (citation and quotation marks omitted); see also *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981) (“The common law action for civil conspiracy is for damages caused by acts committed pursuant to a conspiracy rather than for the conspiracy, i.e., the agreement, itself.” (citation and internal alteration omitted)).

A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed. The existence of a conspiracy requires proof of an agreement between two or more persons. Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury.

Dove, 168 N.C. App. at 690-91, 608 S.E.2d at 801 (internal citations and quotation marks omitted). “Thus to create civil liability for conspiracy,” *Dickens*, 302 N.C. at 456, 276 S.E.2d at 357, the Plaintiffs must have alleged “(1) an agreement between two or more individuals; (2) to do an unlawful act or to do an lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.” *Privette v. Univ. of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989) (citation omitted); see also *Elliott v. Elliott*, 200 N.C. App. 259, 264, 683 S.E.2d 405, 409 (2009). Circumstantial evidence may be used to prove the existence of an agreement; however, “the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission

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of the issue to a jury.” *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337 (citing *Edwards v. Ashcraft*, 201 N.C. 246, 159 S.E. 355 (1931). *See also State v. Martin*, 191 N.C. 404, 132 S.E. 16 (1926)).

¶ 69 “We must judge the sufficiency of the complaint by the facts alleged and not by the pleader’s conclusions. . . . The repeated use of the words combined, conspired, and agreed together to injure [Plaintiffs] . . . [are] insufficient.” *Shope*, 268 N.C. at 405, 150 S.E.2d at 774 (internal citation omitted). Recovery, in the context of a civil conspiracy claim, “must be on the basis of [the sufficiency] of [the] alleged wrongful overt acts.” *Dove*, 168 N.C. App. at 690, 608 S.E.2d at 800 (citation omitted).

¶ 70 Here, Plaintiffs’ “claims [are] essentially derived from allegations that [Defendants] knowingly gave false information” to the RMA and SBI. *See Hawkins v. Webster*, 78 N.C. App. 589, 590, 337 S.E.2d 682, 683 (1985). This Court, however, has previously held that “[a] civil action may not be maintained for a conspiracy to give false testimony.” *Id.* at 592, 337 S.E.2d at 684 (citation omitted). In *Hawkins*, this Court affirmed the dismissal of a civil conspiracy claim where the plaintiff alleged “defendants knowingly gave false information to the FBI and IRS agents who conducted the investigation that resulted in criminal charges being filed against [the plaintiff].” *Id.* at 590, 337 S.E.2d at 683. Similarly, this Court declined to find a civil conspiracy cause of action where a plaintiff alleged “the Defendants conspired together to commit the unlawful acts of having Plaintiffs falsely arrested and assert[ed] that Defendants ‘knowingly provid[ed] false and misleading affidavits and other false information in order to secure the issuance of [] bogus arrest warrants.” *Strickland*, 194 N.C. App. at 19, 669 S.E.2d at 72-73 (internal quotation marks omitted).

¶ 71 Moreover, Plaintiffs failed to allege any specific factual allegations about the purported conspiracy. Plaintiffs’ complaint is devoid of any factual allegations regarding a meeting or agreement between all Defendants. While Plaintiffs pleaded all Defendants “reached an agreement,” and “agreed to gather information,” such claims constitute mere conclusions regarding an alleged agreement. *See Shope*, 268 N.C. at 405, 150 S.E.2d at 774. The complaint is devoid of any factual allegations regarding how or when all Defendants reached such an agreement.

¶ 72 Viewing Plaintiffs’ complaint in light of our precedent, “a conspiracy to provide false [statements] in order to secure Plaintiffs’ arrest . . . is not recognized in North Carolina.” *Strickland*, 194 N.C. App. at 19, 669 S.E.2d at 73. Therefore, the trial court did not err when it dismissed Plaintiffs’ civil conspiracy cause of action. As Plaintiffs failed to sufficiently plead factual allegations to support their claim of civil conspiracy, we need not

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address whether Plaintiffs' claim is barred by the affirmative defenses of intra-corporate immunity or government immunity.

C. Abuse of Process

¶ 73 Next, Plaintiffs contend the trial court erred in dismissing their abuse of process claim asserted against Defendants Johnson, Bellamy, and Hastings. The trial court's order dismissing Plaintiffs' claim for abuse of process does not provide its reasoning for granting the motion to dismiss. On appeal, however, Plaintiffs first address whether their claim was barred by the applicable statute of limitations. The parties dispute whether Plaintiffs preserved any remaining arguments regarding the sufficiency of their pleadings with respect to this cause of action.

1. Statute of Limitations

¶ 74 [3] Plaintiffs first contend their abuse of process claim is not barred by the applicable statute of limitations because the limitations period commences upon "the termination of the acts which constitute the abuse complained of." *See* 1 AM.JUR.2d, Abuse of Process, § 27. Because to support a claim of abuse of process, Plaintiffs must sufficiently plead acts that occur after the institution of the process, we conclude that the limitations period commences upon the last tortious act about which Plaintiffs complained.

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all.

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: Hard cases must not make bad law.

Congleton v. City of Asheboro, 8 N.C. App. 571, 573-74, 174 S.E.2d 870, 872 (1970) (internal quotation marks and citations omitted).

¶ 75 Abuse of process is an intentional tort, and the tort of abuse of process has a three-year limitations period. *See Barnette v. Woody*, 242

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N.C. 424, 431, 88 S.E.2d 223, 227 (1955) (citation omitted); *see also Cox v. Jefferson-Pilot*, 80 N.C. App. 122, 124, 341 S.E.2d 608, 610 (1986). “Ordinarily, the period of the statute of limitations begins to run when the plaintiff’s right to maintain an action for the wrong alleged accrues.” *Rafferty v. Wm. C. Vick Constr. Co.*, 291 N.C. 184, 184, 230 S.E.2d 405, 407 (1976) (internal quotation marks, citation, and emphasis omitted). “[A] cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue” *Id.* at 182, 230 S.E.2d at 407 (citation omitted).

¶ 76 Plaintiffs, relying on secondary sources and *Barnette v. Woody*, argue the applicable limitations period commenced upon “the termination of the acts which constitute the abuse complained of.” *See* 1 AM.JUR.2d, Abuse of Process, § 27 (1994); *see also* J.A. Brock, Annotation, When the Statute of Limitations Begins to Run Against Action for Abuse of Process, 1 A.L.R.3d 953 (2016). In *Barnette*, the plaintiff alleged the defendant conspired “to procure the admission of the plaintiff to the State Hospital.” 242 N.C. at 426, 88 S.E.2d at 224. The plaintiff was committed to the State Hospital on March 21, 1950 and was released on June 8, 1950. *Id.* The plaintiff brought a civil action seeking punitive and actual damages, but it was not clear “whether [the plaintiff] is seeking to recover on an action for malicious prosecution, abuse of process, or for false imprisonment.” *Id.* at 430, 88 S.E.2d at 227. Our Supreme Court proceeded to apply a three-year statute of limitations from the date of the plaintiff’s release from a state hospital. *Id.* at 431, 88 S.E.2d at 227 (“Hence, the three-year statute of limitations pleaded by the defendants, G.S. § 1-52, would not be a bar to an action for malicious prosecution or abuse of process.”).

¶ 77 Plaintiffs contend *Barnette* supports the proposition that the applicable statute of limitations commenced when the claim for abuse of process accrued, that is, upon the last tortious act after process was instituted. We agree.

¶ 78 Defendants Johnson, Bellamy, and Hastings argue Plaintiffs’ claim accrued upon their arrest on September 21, 2007, and thus, is time barred. Defendants Johnson, Bellamy, and Hastings rely on *Cox v. City of Jefferson-Pilot* to argue Plaintiffs’ claim accrued upon their arrest date. In *Cox*, the dispositive issue was whether the plaintiff was mentally competent to enter into a general release of liability. *See Cox*, 80 N.C. App. at 124-25, 341 S.E.2d at 610. The plaintiff argued he was mentally incompetent at the time he executed a release of liability and, thus, the statute of limitations was tolled during his incompetency. *Id.* The plaintiff’s wife had previously been arrested for embezzling approxi-

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mately \$152,000.00 from her employer. *Id.* at 122, 341 S.E.2d at 609. The plaintiff was subsequently arrested and jailed for approximately two weeks. *Id.* After the plaintiff's arrest, his wife's employer and its insurance company filed a civil suit against the plaintiff and his wife, attaching the couple's property. *Id.* at 123, 341 S.E.2d at 609. The civil suit was settled by a consent judgment, signed by both the plaintiff and his wife. *Id.* Thereafter, on September 26, 1978, the plaintiff executed a release of liability in favor of the employer and insurance company. *Id.*

¶ 79 In 1983, the plaintiff filed a civil action in which he did not specify a cause of action but alleged his wife's employer and its insurance company wrongfully initiated his arrest and the seizure of his property. *Id.* The plaintiff further alleged he was mentally incompetent at the time he executed the release. *Id.* On appeal, he asserted he sufficiently pleaded an abuse of process claim. *Id.* at 124, 341 S.E.2d at 610. This Court found the plaintiff was mentally competent at the time he entered into a general release of liability. *Id.* at 126, 341 S.E.2d at 611. As such, the limitations period was not tolled, and Plaintiff's abuse of process cause of action was time barred. *Id.* at 128, 341 S.E.2d at 612.

¶ 80 Here, in contrast, Plaintiffs did not execute a release of liability in favor of any named defendant. Instead, Plaintiffs "pleaded continuing tortious acts after the arrest date," the last of which concluded upon the dismissal of all remaining charges against Plaintiffs on February 23, 2009. These acts include Defendants Johnson, Bellamy, and Hastings's purported failure to provide exculpatory information during the course of the investigations and Sanders' criminal trial; and the continuous use of the pending criminal prosecution of Sanders and Fox "in an attempt to elicit information from Fox and Sanders," and force them out of the GPD. Thus, the statute of limitations for Plaintiffs' abuse of process cause of action did not run until February 23, 2012, three years after the termination of the last alleged act of abuse of process of which the Plaintiffs complained.

¶ 81 While our dissenting colleague proposes that we conclude the limitations period commenced upon the institution of the process, to do so would muddle the distinction between the claims of malicious prosecution and abuse of process and would ignore precedent establishing an improper act after the initiation of the process as an essential element of a colorable abuse of process claim. *See Chidnese*, 210 N.C. App. at 304, 708 S.E.2d at 731; *see also Fox v. Barrett*, 90 N.C. App. 135, 138, 367 S.E.2d 412, 414 (1988) (affirming the dismissal of an abuse of process cause of action where the plaintiff failed to allege "any improper act by defendant occurring *subsequent* to the initiation of the prior lawsuit." (emphasis in original)).

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2. Sufficiency of the Pleadings

¶ 82 [4] Plaintiffs further contend they sufficiently pleaded actions by Defendants Johnson, Bellamy, and Hastings that arose to abuse of process.¹⁰ We agree.

Protection against wrongful litigation is afforded by a cause of action for either abuse of process or malicious prosecution. The legal theories underlying the two actions parallel one another to a substantial degree, and often the facts of a case would support a claim under either theory. The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued.

Chidnese, 210 N.C. App. at 304, 708 S.E.2d at 731 (citations and internal quotation marks omitted). “Abuse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process . . . to accomplish some purpose not warranted or commended by the writ.” *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965) (citations omitted); see also *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E.2d 276, 278 (1945) (“[M]alicious prosecution is the prosecution with malice and without probable cause, abuse of process is the misuse of legal process for an ulterior purpose.”). Thus, the distinction between malicious prosecution and abuse of process is that malicious prosecution requires a claim to be improperly instituted, whereas abuse of process requires a wrongful or improper act after the institution of process. *Chidnese*, 210 N.C. App. at 304, 708 S.E.2d at 731 (citations omitted); see also *Fox*, 90 N.C. App. at 138, 367 S.E.2d at 414.

¶ 83 “Abuse of process requires both an ulterior motive and an [improper] act in the use of the legal process . . . [during] the regular prosecution of the proceeding, and that both . . . relate to . . . defendant’s purpose to achieve . . . [using] the process some end foreign to those it was designed to effect.” *Fuhs v. Fuhs*, 245 N.C. App. 367, 375, 782 S.E.2d 385,

10. Defendants Johnson, Bellamy, and Hastings contend this argument is not preserved for appellate review, see N.C. R. App. P. 28(a), because Plaintiffs’ “abuse of process argument in their principal appellants concerns *only* the statute of limitations.” (emphasis in original). However, in their appellate brief, Plaintiffs argue several alleged acts by Defendants Johnson, Bellamy, and Hastings constitute tortious acts for an abuse of process cause of action.

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390 (2016) (citation and emphasis omitted); *see also Klander v. West*, 205 N.C. 524, 529, 171 S.E.2d 782, 783 (1933) (recognizing “the two essential elements are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding”). The “ulterior motive” requirement for an abuse of process claim is satisfied “when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used.” *Fuhs*, 245 N.C. App. at 375, 782 S.E.2d at 390 (citation omitted). “The act requirement is satisfied when the plaintiff alleges that *once the prior proceeding* was initiated, the defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.” *Id.* (emphasis added).

¶ 84 Defendants Johnson, Bellamy, and Hastings contend Plaintiffs’ claim must fail as Plaintiffs did not plead any improper act by these Defendants after Plaintiffs’ indictment. *See Fox*, 90 N.C. App. at 138, 367 S.E.2d at 414 (affirming the dismissal of an abuse of process cause of action where the plaintiff failed to allege “any improper act by defendant occurring *subsequent to* the initiation of the prior lawsuit.” (emphasis in original)); *see also Hewes v. Wolfe*, 74 N.C. App. 610, 610-13, 330 S.E.2d 16, 18-20 (1985) (affirming the denial of a motion to dismiss the plaintiff’s abuse of process cause of action where defendant brought an earlier civil action for the misappropriation of partnership assets and subsequently filed a notice of *lis pendens* on the plaintiff’s property). “[T]he gravamen of a cause of action for abuse of process is the improper use of the process *after it has been issued*.” *Chidnese*, 210 N.C. App. at 311, 708 S.E.2d at 735 (citation omitted) (emphasis in original).

¶ 85 In the instant case, Plaintiffs alleged

73. Defendants Johnson, Bellamy, . . . and Hastings, acting in their official capacities as duly assigned agents of the City of Greensboro, and the City of Greensboro willfully and maliciously took actions in the use of the legal process that were not proper in the regular prosecution of the proceeding by, *inter alia*,

i. Using the threat of prosecution, and the proceeding itself, as leverage against Fox and Sanders in an attempt to elicit information from Fox and Sanders;

ii. Using the threat of prosecution, and the proceeding itself, as leverage to pressure Fox and Sanders out of the [GPD]; and

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iii. Failing to produce exculpatory information with respect to the charges against Fox and Sanders despite defendants' affirmative duty to provide said information. Defendants were charged with an affirmative duty to provide said information due to:

1. The fiduciary relationship between the defendants and Fox and Sanders;
2. The defendants' involvement in the initiation of the investigation of Fox and Sanders; and
3. The defendant's involvement in the investigation of Fox and Sanders.

74. Defendants Johnson, Bellamy, . . . Hastings, and the City of Greensboro acted with an ulterior motive or purpose by taking the aforementioned actions for the purposes of discrediting former Chief of Police David Wray, advancing the defendants' own careers, and for the purpose of appeasing a segment of the African American community.

While Defendants Johnson, Bellamy, and Hastings are correct in that Plaintiffs must allege acts *after* the initiation of the proceeding, Plaintiffs satisfied this requirement by pleading Defendants Johnson, Bellamy, and Hastings failed to produce exculpatory information during the investigation of Plaintiffs and Sanders' subsequent criminal trial.¹¹

¶ 86

Additionally, Plaintiffs asserted allegations that Defendants Johnson, Bellamy, and Hastings "acted with an ulterior motive" by failing to produce such information in order to gain "leverage to pressure Fox and Sanders out of the [GPD]," and "in an attempt to elicit information from Fox and Sanders." These acts constitute continuous actions by Defendants Johnson, Bellamy, and Hastings, as the duty to provide exculpatory information arose during the investigation of the Wray administration and did not cease until Plaintiffs were no longer under the threat of criminal prosecution. Because Plaintiffs sufficiently alleged

11. While the record on appeal reveals Defendant Hastings testified on Sanders's behalf during Sanders's trial for impermissibly accessing a government computer, we do not consider this fact in our analysis. Plaintiffs' abuse of process claim was dismissed on August 13, 2012. In reviewing the grant of a motion to dismiss, we consider "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Chidnese*, 210 N.C. App. at 304, 708 S.E.2d at 730 (emphasis added) (citation omitted).

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Defendants Johnson, Bellamy, and Hastings acted with an ulterior motive, we hold the trial court erred in dismissing Plaintiffs' abuse of process claim. *See Hewes v. Wolfe*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (finding allegations the defendant acted "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs[]" sufficient to survive a motion to dismiss). Accordingly, we reverse the trial court's order with respect to this cause of action, and remand for further proceedings.

III. Conclusion

¶ 87 After careful review, we hold the trial court did not err by dismissing Plaintiffs' civil conspiracy claim against all Defendants. Nor did the trial court err in granting summary judgment with respect to Plaintiffs' malicious prosecution claim against Defendants Johnson, Bellamy, and Hastings. However, the trial court erred in dismissing Plaintiffs' abuse of process cause of action, as the claim was not time barred and Plaintiffs sufficiently pleaded facts to support their claim. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Judge ZACHARY concurs.

Judge JACKSON concurs in part and dissents in part by separate opinion.

JACKSON, Judge, concurring in part and dissenting in part.

¶ 88 I concur in part, joining the majority opinion except for the portion holding that the statute of limitations for Plaintiffs' abuse of process claim had not run until 23 February 2012. In my view, the allegations pleaded in the fourth count of Plaintiffs' complaint allege two separate abuse of process claims: (1) for the threat and initiation of criminal proceedings against Plaintiffs in September 2007; and (2) for alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), in the trial of Plaintiff Sanders, while Plaintiff Fox was awaiting trial.

¶ 89 With respect to the first claim, I would hold that the statute of limitations had run on 17 September 2010—three years after Plaintiffs were indicted on these charges in Guilford County Superior Court. I would therefore affirm the trial court's grant of the motion to dismiss this claim because it was tolled until 20 September 2011, and Plaintiffs did not initi-

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ate this action until January 2012—well after September 2010, when the three-year statute of limitations had run, and several months after the September 2011 re-filing deadline, when the tolling period had expired.¹

¶ 90

With respect to the second claim, however, I would hold that the allegations in the complaint fail to demonstrate whether or when the claim for abuse of process because of the *Brady* violation accrued. I would therefore vacate the trial court's order granting the motion to dismiss in part and remand the case to the trial court for further proceedings on this claim. Accordingly, I respectfully dissent from the portion of the majority opinion related to the statute of limitations on Plaintiffs' abuse of process claim(s).

IV. Standard of Review

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007) (internal marks and citations omitted).

1. On 23 March 2010, Plaintiffs filed a federal lawsuit asserting this claim. *Fox v. City of Greensboro*, 807 F. Supp.2d 476, 480 (M.D.N.C. 2011). Under 28 U.S.C. § 1367(d), it was tolled during the pendency of the federal case until 30 days after 27 August 2011, when the case was dismissed. *See* 28 U.S.C. § 1367(d) (2019) (providing for tolling of state law claims brought in federal court "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period"); *Fox*, 807 F. Supp.2d at 500-01 (dismissing Plaintiffs' state law claims without prejudice).

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V. Analysis

D. Abuse of Process Compared to Malicious Prosecution

¶ 91

“The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing [] process to issue, while abuse of process lies for its improper use after it has been issued.” *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E.2d 223, 227 (1955). Whereas “[i]n an action for malicious prosecution the plaintiff must prove malice, want of probable cause and termination of the prosecution or proceeding in plaintiff’s favor[,] . . . the only essential elements of abuse of process are[] . . . the existence of an ulterior purpose and . . . an act in the use of the process not proper in the regular prosecution of the proceeding.” *Id.*, 88 S.E.2d at 227-28 (citations omitted). Thus, while a claim of malicious prosecution requires a showing that “the defendant (1) initiated or participated in the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff[,]” *Turner v. Thomas*, 369 N.C. 419, 425, 794 S.E.2d 439, 444 (2016) (citation omitted), in an action for abuse of process, the plaintiff need only show “(1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a malicious misuse or misapplication of that process after issuance to accomplish some purpose not warranted or commanded by the writ[,]” *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (internal marks and citation omitted). Accordingly, unlike an action for malicious prosecution, which can only be brought after a prior proceeding terminates in the plaintiff’s favor, *Turner*, 369 N.C. at 425, 794 S.E.2d at 444, an action for abuse of process can be commenced as soon as the process at issue is filed or interposed, *see, e.g., Hewes v. Wolfe*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (holding that assertion of a claim for abuse of process was proper once the defendants “filed notices of *lis pendens* and notices of lien on property owned by [the] plaintiffs”).

E. When the Statute of Limitations Begins to Run

¶ 92

Generally speaking, “a cause of action accrues [] and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises.” *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citations omitted). Application of this general rule to a claim for abuse of process suggests that the statute of limitations for abuse of process begins to run as soon as the plaintiff’s cause of action accrues, i.e., upon the filing or interposition of the allegedly abusive process.

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Cf. Hewes, 74 N.C. App. at 614, 330 S.E.2d at 19. Yet the question of when the three-year statute of limitations begins to run appears unsettled under North Carolina law, as the parties' divergent positions and the authority cited in support of these positions illustrates.

¶ 93 Plaintiffs cite our Supreme Court's decision in *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955), in support of their argument that the statute of limitations began to run "from the termination of the acts which constitute[d] the abuse complained of." (Citation omitted.) The plaintiff in *Barnette* was involuntarily committed to a mental institution for 76 days and subsequently brought an action for abuse of process against various individuals involved in her involuntary commitment. *Id.* at 426-31, 88 S.E.2d at 224-27. The defendants pleaded the three-year statute of limitations in defense because the process at issue was filed with the Clerk of Superior Court of Person County on 21 March 1950 and the plaintiff did not initiate the action until 26 May 1953—three years, two months, and five days after the process was filed. *See id.* at 428, 431, 88 S.E.2d at 225, 227. Our Supreme Court rejected the argument that the plaintiff's claim was time-barred because it was filed more than three years after the date the process was filed with the Clerk of Superior Court, seeming to reason that the statute of limitations began to run upon the plaintiff's release, or on some other day after 21 March 1950. *Id.* at 431, 88 S.E.2d at 227.

¶ 94 Defendants cite our Court's decision in *Cox v. Jefferson-Pilot*, 80 N.C. App. 122, 341 S.E.2d 608 (1986), in support of their argument that the statute of limitations began to run on the date of Plaintiffs' arrests. In *Cox*, the plaintiff was interrogated, arrested, and jailed for 14 days after his wife was charged with embezzling funds from her employer. *Id.* at 122, 341 S.E.2d at 609. After the charges against him were dismissed, the plaintiff brought an action against his wife's employer for abuse of process. *Id.* at 123, 341 S.E.2d at 609-10. Our Court held that the statute of limitations for the plaintiff's claim began to run on the day the plaintiff was arrested and charged in connection with his wife's embezzlement. *See id.* at 122-24, 341 S.E.2d at 609-10. Thus, while consistent with the general rule that statutes of limitation begin to run when the underlying cause of action accrues, our holding in *Cox* appears to conflict with our Supreme Court's decision in *Barnette*.

¶ 95 I believe that the comments to the Second Restatement of Torts suggest a resolution of this apparent conflict. *See* Restatement 2d of Torts § 682 cmt. a. These comments state that "[t]he gravamen of the misconduct [in an action for abuse of process] . . . is the misuse of process, no matter how properly obtained, for any purpose other than

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that which it was designed to accomplish.” *Id.* That is, “subsequent misuse of [] process, [] properly obtained, constitutes the misconduct for which [] liability is imposed[.]” *Id.* Accordingly, I interpret our Supreme Court’s decision in *Barnette* to describe a situation where process was properly filed, but the process was subsequently abused, despite being filed for a proper purpose at the outset. The recitation of the facts that precedes the Court’s opinion in *Barnette* supports this interpretation, in my view: in the facts, it is noted that the Clerk of Superior Court of Person County had initially ordered the plaintiff to be involuntarily committed for 30 days, and subsequently ordered that she continue to be committed for an additional 30 days; our Supreme Court also stated, however, that the plaintiff was not released until after being confined in the mental institution for 76 days—16 days longer than ordered. *See* 242 N.C. at 428, 431, 88 S.E.2d at 225-26, 227.

¶ 96 I would therefore hold that the three-year statute of limitations for abuse of process begins to run at the time the cause of action accrues, which is as soon as the process is improperly filed or interposed, *see Hewes*, 74 N.C. App. at 614, 330 S.E.2d at 19, or when process properly filed or interposed becomes misused subsequently, as I believe happened in *Barnette*.

F. Abuse of Process Alleged in Plaintiffs’ Complaint

¶ 97 As noted above, I believe the allegations pleaded in the fourth count of Plaintiffs’ complaint allege two separate claims for abuse of process: (1) for the threat and initiation of criminal proceedings against Plaintiffs in September 2007; and (2) for alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), in the trial of Plaintiff Sanders, while Plaintiff Fox was awaiting trial. Plaintiffs alleged in the fourth count of their complaint in relevant part as follows:

73. Defendants Johnson, Bellamy, Kelly and Hastings, acting in their official capacities as duly assigned agents of the City of Greensboro, and the City of Greensboro willfully and maliciously took actions in the use of legal process that were not proper in the regular prosecution of the proceeding by, *inter alia*,

i. Using the threat of prosecution, and the proceeding itself, as leverage against Fox and Sanders in an attempt to elicit information from Fox and Sanders;

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ii. Using the threat of prosecution, and the proceeding itself, as leverage to pressure Fox and Sanders out of the Greensboro Police Department; and

iii. Failing to produce exculpatory information with respect to the charges against Fox and Sanders despite defendants' affirmative duty to provide said information. Defendants were charged with an affirmative duty to provide said information due to:

1. The fiduciary relationship between the defendants and Fox and Sanders;
2. The defendants' involvement in the initiation of the investigation of Fox and Sanders; and
3. The defendants' involvement in the investigation of Fox and Sanders.

¶ 98 Regarding the first claim—the actions alleged in subsections i. and ii. of paragraph 73 of Plaintiffs' complaint—I would hold that the statute of limitations had run on 17 September 2010, three years after Plaintiffs were indicted on the charges in Guilford County Superior Court. Assuming the truth of the allegations in the complaint, as we must when reviewing a motion to dismiss, *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428-29, I believe Plaintiffs' cause of action for abuse of process stemming from the charges in September 2007 accrued on the date they were indicted—17 September 2007—because as I understand it, this claim is that the indictment itself was legal process improperly filed in Guilford County Superior Court with an ulterior motive. Accordingly, I would affirm the trial court's grant of the motion to dismiss on this claim because Plaintiffs did not initiate this action until January 2012, several months after the expiration of the 30-day deadline to re-file the claim after the federal lawsuit was dismissed without prejudice to state-law claims on 27 August 2011.

¶ 99 Regarding the second claim—the actions alleged in subsection iii. of paragraph 73 of Plaintiffs' complaint—I would hold that the allegations in the complaint fail to demonstrate whether or when the claim for abuse of process because of the *Brady* violation accrued. The allegations in subsection iii. of paragraph 73 do not specify when the alleged failure to produce exculpatory information occurred, and it appears that this alleged failure to produce exculpatory information could have occurred within the three-year statute of limitations, and it might be likely

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that it did. I would therefore vacate the trial court's order granting the motion to dismiss in part and remand the case to the trial court for further proceedings on this claim.

VI. Conclusion

¶ 100 In sum, I concur in the majority opinion in part, and dissent from it in part, because the allegations in the complaint allege two separate abuse of process claims, and I would hold that the statute of limitations has run on one, but it is impossible to tell whether it has on the other.

HORTENSE PAMELA HILL, PLAINTIFF

v.

DAVID WARNER BOONE, M.D., AND RALEIGH ORTHOPAEDIC
CLINIC, P.A., DEFENDANTS

No. COA20-488

Filed 21 September 2021

1. Appeal and Error—standard of review—bifurcated trial—medical malpractice—admission of evidence during liability phase

In an appeal challenging the admission of evidence—video surveillance footage—related to compensatory damages during the liability portion of a bifurcated medical malpractice trial, the Court of Appeals applied a de novo standard to first determine whether the video was relevant for impeachment purposes and whether it was properly authenticated. Although the court would have employed an abuse of discretion standard to determine whether the evidence should have been excluded under Evidence Rule 403, plaintiff abandoned that issue by failing to argue it on appeal.

2. Evidence—authentication—video surveillance—cross-examination of person depicted in video

In a bifurcated medical malpractice trial brought by plaintiff after she had foot surgery, video surveillance of plaintiff introduced by defendants during the liability phase was not authenticated by typical means where defendants did not introduce testimony from the video's creator and instead cross-examined plaintiff to ask if she appeared in the video on various dates and times, which she confirmed. Although plaintiff's responses, without more, would have been insufficient, her admissions regarding depictions of her grandchild—including his age—in the video, which served to establish

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her health status during a relevant time period, constituted authentication of those portions such that they could be used for impeachment purposes.

3. Evidence—relevance—damages evidence introduced during liability phase—impeachment

In a bifurcated medical malpractice trial in which defendants introduced video surveillance of plaintiff during the liability phase, the video was properly admitted for impeachment purposes after plaintiff opened the door to her credibility by testifying about the nature of the pain she felt and the resulting physical limitations she suffered after she had foot surgery.

4. Evidence—introduced for impeachment purposes—limiting instruction not requested

In a bifurcated medical malpractice trial in which video surveillance of plaintiff was properly admitted during the liability phase for impeachment purposes, the trial court was not required to give a limiting instruction absent a request from plaintiff.

5. Appeal and Error—preservation of issues—closing argument in medical malpractice trial—no objection

In a bifurcated medical malpractice case, where plaintiff did not object to defendants' closing argument regarding video surveillance of her that they introduced during the liability phase, she did not preserve for appeal her argument that defendants improperly suggested that the video had been introduced for substantive, and not for impeachment, purposes.

Appeal by Plaintiff from judgment entered 17 September 2019 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 11 May 2021.

Knott and Boyle, PLLC, by W. Ellis Boyle and Benjamin Van Steinburgh, for plaintiff-appellant.

Yates McLamb & Weyher, LLP, by John W. Minier and Alexandra L. Couch, for defendants-appellees.

MURPHY, Judge.

Evidence regarding damages may not typically be admitted during the liability portion of a bifurcated trial pursuant to N.C.G.S. § 1A-1,

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Rule 42(b)(3). However, as here, when Plaintiff opened the door to evidence relevant for impeachment purposes by testifying regarding her current health condition during the liability portion of such a bifurcated trial, the opposing party was allowed to ask questions and present relevant evidence for the limited purpose of impeaching that testimony, even though such evidence would otherwise be inadmissible due to its relation to damages. When using a videotape to impeach a party's testimony, the videotape must be properly authenticated, which was accomplished here by Plaintiff's admission that she is the person in the videotape and that the videotape portrayed a time period relevant for impeachment purposes. Finally, the trial court was not required to give a limiting instruction regarding evidence admitted for impeachment purposes in the absence of a request for such an instruction.

BACKGROUND

¶ 2 Plaintiff Hortense Pamela Hill sued Dr. David Warner Boone and Raleigh Orthopaedic Clinic, P.A. (collectively, "Defendants") for malpractice arising from surgeries to her right foot. On 2 May 2014, Dr. Boone operated on Plaintiff's right foot to remedy calcaneocuboid osteoarthritis. He used a 45 mm screw, which traveled 7 to 10 mm past the bottom of Plaintiff's bone into soft tissue. When Plaintiff reported experiencing pain in different areas of her foot, Dr. Boone took an x-ray from a different angle than previous x-rays taken after surgery, discovered the screw used in the initial surgery was too long, and recommended an additional surgery. During the second surgery on 13 June 2014, Dr. Boone removed the original screw and replaced it with a 36 mm screw.

¶ 3 In her *Complaint* filed 15 March 2017, Plaintiff alleged Dr. Boone negligently performed the 2 May 2014 surgery, and claimed she suffers "unremitting pain in her right foot . . . [which is] more intense after she walks for even a few feet" and that she "cannot stand more than a few minutes without severe pain in her right foot." She also claimed she could not "partake in activities she previously enjoyed such as dancing, bowling, going to the movies, being a spectator at sporting events, traveling, and walking her dog."

¶ 4 On 14 February 2019, Plaintiff moved to bifurcate the trial pursuant to N.C.G.S. § 1A-1, Rule 42(b)(3), which the trial court granted on 18 March 2019. The trial court's decision to bifurcate the trial is not challenged by either party on appeal.

¶ 5 At trial, Plaintiff testified she currently uses a scooter and that she was not using a scooter to get around in November of 2013 when she re-injured her foot or prior to that. She testified that she continues

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to take the same amount of nerve blocking medication because of pain in her right foot as she did in 2014, the pain decreased but never went away after the surgery, and that she could not find anything that could be done to take the pain away—“basically it is . . . there and that’s it.” (Emphasis added). On cross-examination, she also stated “[t]he toes is what I meant can’t touch anything. . . . It’s my big toe and my three toes next to it is what can’t touch anything.”

¶ 6 On cross-examination and over Plaintiff’s objection, Defendants played and asked questions regarding an exhibit compiling videos of Plaintiff obtained via private surveillance, which “shows Plaintiff walking, visiting various stores, navigating street curbs on her allegedly injured foot, climbing stairs, driving around town, loading her car with groceries, babysitting her grandson, pushing a stroller, and carrying her grandson while navigating curbs, among other things.”

¶ 7 Plaintiff had been deposed on 30 August 2017, where she described the current condition of her foot extensively. At trial, Defendants’ first reference to that deposition occurred prior to playing the videotape surveillance and during a question by Defendants about Plaintiff quitting a job in 1999, to which Plaintiff objected. After that initial reference to the deposition, Defendants showed the videotape surveillance for the purpose of impeaching her testimony; then, Defendants played a video of Plaintiff’s deposition testimony where Plaintiff claimed she could not drive, walk, or wear shoes as she used to, could not walk her dog, would not be able to take her new grandchild in a stroller because she “can’t walk,” “[n]o one can touch [her] foot[,]” and “can’t have a blanket, a sock or shoe or anything on [her] foot . . . [i]t feels like it’s on fire . . . [and she is] in pain constantly.” Although Plaintiff objected to the prior reference to the deposition, Plaintiff did not object to Defendants playing the video of the deposition.¹

¶ 8 While Defendants cite the 26 March 2019 transcript to claim the deposition was introduced without objection “while cross-examining Plaintiff at trial,” the introduction without objection referenced in Defendants’ brief occurred on 26 March 2019, upon Defendants’ re-direct examination of their own witness. While Plaintiff was on the stand, after

1. The admission of the video of Plaintiff’s deposition testimony is not dispositive to our analysis, as it was not admitted prior to the videotape surveillance, and did not open the door for the videotape surveillance. The videotape surveillance of Plaintiff was admitted first, so other testimony by Plaintiff would have had to open the door, and not the deposition video. See generally *State v. Smith*, 155 N.C. App. 500, 509-10, 573 S.E.2d 618, 624-25 (2002) (holding a party opens the door to impeachment through prior evidence or testimony he or she introduces), *disc. rev. denied*, 357 N.C. 255, 583 S.E.2d 287 (2003).

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the initial objected-to reference to the deposition and subsequent playing of the videotape surveillance, Defendants played the deposition video while cross-examining Plaintiff, without further objection. Plaintiff reaffirmed her deposition testimony, stating:

[DEFENDANTS' COUNSEL:] And during that deposition there were a number of questions where I was asking how you were doing after Dr. Boone's surgeries?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] And at that point you told me that you had to be in bed most of time, right?

[PLAINTIFF:] To keep my foot up, yes.

¶ 9 Outside of the presence of the jury, the trial court allowed the videotape surveillance to be admitted for Defendants' purported impeachment purposes only.

¶ 10 During closing arguments, Defendants made the following statement regarding the videotape surveillance and Plaintiff's testimony, to which Plaintiff did not object:

You've seen the surveillance tapes, and a picture paints 1,000 words. But -- and this thing about \$20,000[.00] -- \$22,000[.00], how dare you spend \$22,000[.00] following her around, sneaking around videoing her -- she attacked Dr. Boone and his livelihood and his profession and his integrity. And on that deposition that you saw on the video, she didn't know we were going to get all her medical records and double-check, and we were going to do surveillance and double-check. And she attacked him aggressively on that. She said she couldn't dance anymore because of his surgery. Remember that. That's pretty aggressive.

That's just a -- to attribute her ability to dance to this surgery, given all the past, is an unfair attack and goes to her credibility. That's why we showed you all that stuff.

(Emphasis added).

¶ 11 The jury found for Defendants on liability on 29 March 2019. The trial judge entered judgment in favor of Defendants on 17 September 2019.

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¶ 12 Plaintiff timely appealed pursuant to N.C.G.S. § 7A-27(b)(1) and argues the trial court improperly allowed Defendants to play the videotape surveillance, as it did not pertain to the liability portion of the bifurcated trial and was not properly authenticated. According to Plaintiff, Defendants improperly introduced the videotape surveillance as evidence and “featured” the videotape surveillance in their closing argument. Plaintiff also argues the trial court was required to give a limiting instruction regarding the videotape surveillance, and that Defendants improperly referenced the videotape surveillance in the closing of the liability portion of the trial, implying Defendants used the videotape surveillance as substantive evidence.

ANALYSIS**A. Standard of Review**

¶ 13 **[1]** According to N.C.G.S. § 1A-1, Rule 42(b)(3):

Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars (\$150,000[.00]), the [trial] court shall order separate trials for the issue of liability and the issue of damages, unless the [trial] court for good cause shown orders a single trial. Evidence relating *solely* to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.

N.C.G.S. § 1A-1, Rule 42(b)(3) (2019) (emphasis added).

¶ 14 Both parties argue the standard of review is abuse of discretion for this appeal, which is incorrect. *See State v. Coleman*, 254 N.C. App. 497, 501-02, 803 S.E.2d 820, 824 (2017) (noting we apply the correct standard of review, despite an appellant’s incorrect assertion of the standard of review). We note

[t]he paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice. In discharging this duty, the [trial] court possesses broad discretionary powers sufficient to meet the circumstances of each case. This supervisory power encompasses the authority to structure the trial logically and to set the order of proof. Absent

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an abuse of discretion, the trial judge's decisions in these matters will not be disturbed on appeal.

The North Carolina Rules of Civil Procedure [specifically, Rule 42(b),] expressly preserve these inherent supervisory powers with regard to severance and bifurcation.

In re Will of Hester, 320 N.C. 738, 741-42, 360 S.E.2d 801, 804 (citations omitted), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987); *see Clarke v. Mikhail*, 243 N.C. App. 677, 694, 779 S.E.2d 150, 163 (2015) (stating “we are asked to review the trial court’s reasoning” in denying a motion for a bifurcated trial under N.C.G.S. § 1A-1, Rule 42(b)(3) for abuse of discretion), *disc. rev. denied*, 782 S.E.2d 892 (2016); *Webster Enters., Inc. v. Selective Ins. Co. of the Southeast*, 125 N.C. App. 36, 46, 479 S.E.2d 243, 249-50 (1997) (citation omitted) (“The trial court is vested with broad discretionary authority in determining whether to bifurcate a trial. This Court will not superimpose its judgment on the trial court absent a showing the trial court abused its discretion by entering an order manifestly unsupported by reason.”).

¶ 15

However, Plaintiff is not arguing on appeal that the trial court erred in granting a bifurcated trial, which would merit an abuse of discretion review. Rather, Plaintiff argues that the videotape evidence, allowed for impeachment purposes, pertained to damages rather than to issues of liability, and was not properly authenticated. The proper standard of review for whether the videotape surveillance evidence was relevant for impeachment purposes is first de novo under Rule 401.² *See Clarke*, 243 N.C. App. at 695, 779 S.E.2d at 163 (emphasis added) (noting, despite the trial court’s denial of the motion to bifurcate under N.C.G.S. § 1A-1,

2. According to Rule 607, “[t]he credibility of a witness may be attacked by any party, including the party calling him.” N.C.G.S. § 8C-1, Rule 607 (2019). However, “the impeaching proof must be relevant within the meaning of Rule 401 and Rule 403[.]” *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987) (emphasis omitted). We examine whether the videotape surveillance “was offered for a proper, relevant purpose, to wit: impeachment.” *Holland v. French*, 273 N.C. App. 252, 262, 848 S.E.2d 274, 282 (2020); *see generally State v. Cherry*, 298 N.C. 86, 98, 257 S.E.2d 551, 559 (1979) (“The language of [a] statute [governing a phase of a bifurcated trial] does not alter the usual rules of evidence or impair the trial judge’s power to rule on the admissibility of evidence. . . . Generally, evidence is relevant and admissible when it tends to shed any light on the matter at issue.”), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980).

We also note that we review de novo whether a trial court complied with a statutory mandate, in this case the prohibition in N.C.G.S. § 1A-1, Rule 42(b)(3) of the admission of damages evidence during the liability portion of a bifurcated trial. *See In re E.A.*, 267 N.C. App. 396, 399, 833 S.E.2d 630, 632 (2019).

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Rule 42(b)(3), “[o]ur review confirms [the disputed evidence was] both *relevant* and that the trial court did not abuse [its] discretion in determining that the [disputed evidence was] not unfairly prejudicial to [the] [p]laintiff”). Accordingly, we first apply a *de novo* standard of review to determine whether the videotape surveillance was offered for a relevant purpose. If we determine the videotape surveillance was relevant for impeachment purposes, we typically also analyze whether it should have been excluded under Rule 403, which would be reviewed for abuse of discretion. *See Holland*, 273 N.C. App. at 266, 848 S.E.2d at 284. However, Plaintiff did not address Rule 403 in her brief, and has abandoned this argument on appeal. N.C. R. App. P. 28(a) (2021) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”).

¶ 16 “The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated.” *State v. Holmes*, 263 N.C. App. 289, 302, 822 S.E.2d 708, 720 (2018), *disc. rev. denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). “Trial court rulings on relevancy technically are not discretionary.” *Id.* “Whether evidence is relevant is a question of law, [and] we review the trial court’s admission of the evidence *de novo*.” *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010).

¶ 17 Further, the correct standard of review regarding authentication of a videotape is *de novo*. *State v. Clemons*, 852 S.E.2d 671, 677-78 & n.3 (N.C. App. 2020); *see also State v. Snead*, 239 N.C. App. 439, 443, 768 S.E.2d 344, 347 (2015) (“A trial court’s determination as to whether a videotape has been properly authenticated is reviewed *de novo* on appeal.”), *rev’d in part on other grounds*, 368 N.C. 811, 783 S.E.2d 733 (2016).

¶ 18 Accordingly, we conduct a *de novo* review to determine whether the videotape surveillance was both relevant for impeachment purposes and properly authenticated.

¶ 19 We note it would be error under N.C.G.S. § 1A-1, Rule 42(b)(3) to allow the videotape surveillance for substantive purposes in the liability portion of the bifurcated trial. The videotape surveillance clearly depicts evidence that would ordinarily solely be related to compensatory damages and prejudice Plaintiff’s case as to liability. However, if the door was opened by Plaintiff on direct examination with testimony regarding her current health status, the videotape surveillance would be relevant for impeachment purposes. *See generally State v. Safrit*, 145 N.C. App. 541, 549, 551 S.E.2d 516, 522 (2001); *Harrison v. Garrett*, 132 N.C. 172, 176-77, 43 S.E. 594, 596 (1903). Arguments related to whether Plaintiff properly

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opened the door deserve close scrutiny because of the public policy expressed by our General Assembly in N.C.G.S. § 1A-1, Rule 42(b)(3) – “[e]vidence relating *solely* to compensatory damages *shall not be admissible* until the trier of fact has determined that the defendant is liable.” N.C.G.S. § 1A-1, Rule 42(b)(3) (2019) (emphases added). We first address whether the video was properly authenticated because, if it was not, this would end our inquiry.

B. Authentication of the Videotape Surveillance

¶ 20 **[2]** “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C.G.S. § 8C-1, Rule 901(a) (2019). Our initial review of the transcript and exhibits reveals the videotape surveillance was not properly authenticated under typical requirements. Defendants offered no testimony from the creator of the video to show that the recording process was reliable and “that the matter in question is what its proponent claims.” *See State v. Snead*, 368 N.C. 811, 814, 783 S.E.2d 733, 736 (2016) (quoting N.C.G.S. § 8C-1, Rule 901(a) (2015)).

¶ 21 However, Defendants attempted to authenticate the videotape surveillance by cross-examining Plaintiff. While playing the videotape surveillance, which portrayed Plaintiff with a time-and-date stamp on the screen, Defendants asked Plaintiff the following questions:

[DEFENDANTS’ COUNSEL:] Is this you? Is that your car?

[PLAINTIFF:] Correct.

....

[DEFENDANTS’ COUNSEL:] Can you tell if that’s you?

[PLAINTIFF:] Yes, it’s me.

[DEFENDANTS’ COUNSEL:] And this is a different scene on [16 October 2017]?

[PLAINTIFF:] Yes.

....

[DEFENDANTS’ COUNSEL:] This is still you, correct?

[PLAINTIFF:] Yes.

[DEFENDANTS’ COUNSEL:] Is that you?

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[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] On [16 October 2017]?

[PLAINTIFF:] Yes.

....

[DEFENDANTS' COUNSEL:] Is that you?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] Where are you there?

[PLAINTIFF:] At Home Depot, I guess, or Lowe's. I'm not sure.

[DEFENDANTS' COUNSEL:] And this is the afternoon, according to our timestamp, of [16 October] at 2:53 p.m.[?]

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] And here's [25 October]. Is that you?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] [25 October] at 10:23 a.m. according to the timestamp, right?

[PLAINTIFF:] Correct.

....

[DEFENDANTS' COUNSEL:] Is this you here?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] [21 December], just, for the record, 2017, 10:32 a.m. Is that you?

[PLAINTIFF:] Yes.

....

[DEFENDANTS' COUNSEL:] Is this you in the New York Mets shirt?

[PLAINTIFF:] Correct.

[DEFENDANTS' COUNSEL:] [26 April 2018] according to the timestamp.

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[PLAINTIFF:] Correct.

. . . .

[PLAINTIFF'S COUNSEL:] Your Honor, I raise a separate objection to (inaudible). That's her grandchild and (inaudible) I don't think that should be shown.

[THE COURT:] Overruled.

[DEFENDANTS' COUNSEL:] Is this you on [26 April 2018] at 1:20 p.m.?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] Is that your grandchild that you're with?

[PLAINTIFF:] Correct.

[DEFENDANTS' COUNSEL:] In the stroller?

[PLAINTIFF:] Yes.

. . . .

[DEFENDANTS' COUNSEL:] Now, we're going to a new scene. Is that you?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] Carrying your -- is that your grandchild?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] [11 May 2018]?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] And according to the timestamp 11:44 and now 11:45 a.m.?

[PLAINTIFF:] Correct.

. . . .

[DEFENDANTS' COUNSEL:] And any trouble carrying the grandson here?

[PLAINTIFF:] Yes, as you can see I'm limping more, a little more.

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[DEFENDANTS' COUNSEL:] How old is he in May of 2018?

[PLAINTIFF:] He was born in September of [2017], so he may be about six months.

[DEFENDANTS' COUNSEL:] Do you see where he's sitting in the front of the shopping cart? Can you see that?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] How did he get in that?

[PLAINTIFF:] I put him in there.

¶ 22 Plaintiff's confirmation that the videotape surveillance apparently portrayed her and confirmation of what the video purported to suggest was the time and date of the videos did not constitute a confirmation that the video portrayed her on those days or times, or even at a relevant time period to show her current health status. Such attempts by Defendants to authenticate the videotape surveillance via Plaintiff's admission, without more, would have been insufficient.

¶ 23 However, Plaintiff's testimony regarding her grandchild, who was with her in some of the videos, constitutes an admission regarding her health status at a relevant time period—2017 and 2018—as she admits when her grandchild was born and approximately how old he was in the video. Plaintiff's admission regarding a depiction of her at a relevant time period vis-à-vis her health status, years after the surgery and close to the trial date, constituted an authentication of the portions of the videotape surveillance that included her grandchild, and were appropriate to use, if relevant, for impeachment purposes.³ See *id.* at 815, 783 S.E.2d at 737 (“Given that [the party allegedly portrayed in the video] freely admitted that he is one of the two people seen in the video stealing shirts and that he in fact stole the shirts, he offered the trial court no reason to doubt the reliability or accuracy of the footage contained in the video.”). The videotape surveillance was authenticated via Plaintiff's admissions regarding her grandchild, and we now determine whether the videotape surveillance was relevant for impeachment purposes.

3. We note Plaintiff did not make an argument regarding the exclusion of the entire video in the event a portion is determined to be authenticated.

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C. Relevance of the Videotape Surveillance for Impeachment Purposes

¶ 24 [3] A longstanding principle within our jurisprudence provides that “[t]he primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case.” *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 498 (1959). “Impeachment evidence has been defined as evidence used to undermine a witness’s credibility, with any circumstance tending to show a defect in the witness’s perception, memory, narration or veracity relevant to this purpose.” *State v. Gettys*, 243 N.C. App. 590, 595, 777 S.E.2d 351, 356 (2015), *disc. rev. denied and appeal dismissed*, 368 N.C. 685, 781 S.E.2d 798 (2016).

¶ 25 The opposing party can impeach a witness by offering evidence of that witness’s prior inconsistent statements or dishonesty. *See Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350-51, 324 S.E.2d 619, 620-21 (1985); *State v. Aguillo*, 322 N.C. 818, 824, 370 S.E.2d 676, 679 (1988) (“Prior statements by a [party] [including prior testimony] are a proper subject of inquiry by cross-examination.”); *State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988) (marks and citation omitted) (“[I]mpeachment is an attack upon the credibility of a witness, and is accomplished by such methods as showing the existence of bias; a prior inconsistent statement; untruthful or dishonest character; or defective ability to observe, remember, or recount the matter about which the witness testifies.”).

¶ 26 “It is well-settled law in North Carolina that where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *Safrit*, 145 N.C. App. at 549, 551 S.E.2d at 522 (marks omitted); *see generally Harrison*, 132 N.C. at 176-77, 43 S.E. at 596. If Plaintiff opened the door to impeachment regarding her current health status via testimony on direct examination, Defendants could have impeached her with the authenticated videotape surveillance of her carrying her grandchild while walking and performing other activities on her feet.⁴

4. In addition to arguing the videotape surveillance only pertained to damages, Plaintiff cites an unpublished case to argue she did not open the door to impeachment via the video. *See Kosek v. Barnes*, COA 06-76, 181 N.C. App. 149, 639 S.E.2d 453, 2007 WL 3581 (2007) (unpublished). However, this unpublished case is unpersuasive, as there we deferred to the trial court’s ruling to exclude certain evidence to impeach *under Rule 403* during the compensatory damages phase of a bifurcated trial. *Id.* at *2-*3. Our analysis in

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¶ 27 While Plaintiff did not open the door to impeachment via the claims in her *Complaint* and deposition, as argued briefly by Defendants on appeal,⁵ that she was unable to drive, stand, walk, or have her foot touched due to unremitting pain, her following testimony on direct examination opened the door to further questions regarding the nature of her pain: that she currently uses a scooter after not using one before the injury and subsequent surgery; her current need to take the same amount of nerve blocking medication as she took immediately after her second surgery due to continued pain; the permanent nature of her injury and pain; and that the pain “was [a] burning, numbing, tingly, aching pain where nothing could touch [her] foot.” Such testimony, taken together, opened the door to questions about the nature of Plaintiff’s recent and current pain on cross-examination.

¶ 28 In response to questions on cross-examination regarding the nature of her pain, Plaintiff testified that her toes cannot touch anything. According to Plaintiff, “[i]t’s my big toe and my three toes next to it is what can’t touch anything.” Plaintiff’s statement that her toes cannot touch anything allowed Defendants to impeach her testimony via the videotape surveillance. The videotape surveillance, which showed Plaintiff engaging in activities such as walking, lifting, navigating a curb, and opening the driver’s side door of her car, was relevant to contradict her credibility, particularly her truthfulness about unremitting pain, that her toes cannot touch anything, and inferences that she needed a scooter to move after her injury and surgery. The videotape surveillance evidence was relevant for impeachment purposes under Rule 401. The trial court did not err in allowing Defendants to play the videotape surveillance for the jury while impeaching Plaintiff’s testimony.

D. Lack of a Limiting Instruction

¶ 29 [4] Plaintiff argues the trial court was required to give a limiting instruction regarding the videotape surveillance and cites *State v. Strickland* to support her argument. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970). According to *Strickland*,

Kosek affirmed that a witness’s credibility is impeachable, but such evidence must comply with Rules 401 and 403. *Id.* As acknowledged above, Plaintiff abandoned any argument regarding Rule 403.

5. Defendants’ brief includes the following statement to further the argument that the trial court properly admitted the videotape surveillance to impeach Plaintiff’s testimony: “Defendants admitted into evidence and showed the jury portions of Plaintiff’s videotaped deposition *without any objection from Plaintiff’s counsel.*”

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[a]side from the constitutional and procedural questions here presented, we think it appropriate to observe that the use of properly authenticated moving pictures to illustrate a witness' testimony may be of invaluable aid in the jury's search for a verdict that speaks the truth. However, the powerful impact of this type of evidence requires the trial judge to examine carefully into its authenticity, relevancy, and competency, and—if he finds it to be competent—to give the jury proper limiting instructions at the time it is introduced.

Id. at 262, 173 S.E.2d at 135.

¶ 30 At the time Defendants introduced the video while cross-examining Plaintiff, her counsel objected, and the trial court overruled the objection. The trial court did not give a limiting instruction. Rather, the trial court's subsequent references to the videotape surveillance stated it was for impeachment purposes only, but those references occurred outside of the presence of the jury. Plaintiff did not request the jury be given a limiting instruction. Plaintiff argues the trial court committed reversible error by not *sua sponte* issuing a limiting instruction regarding the video. This is not the law in North Carolina.

¶ 31 Our Supreme Court has held “[t]he trial court is not required to instruct the jury with respect to evidence . . . in the absence of a request to do so.” *Williams v. Bethany Volunteer Fire Dept.*, 307 N.C. 430, 435, 298 S.E.2d 352, 355 (1983) (holding that, where they failed to request a limiting instruction, “[p]arties] cannot [] complain [on appeal] that they were hurt by the introduction of evidence whose thrust they may have been able to limit”). “The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held [to be] error in the absence of a request . . . for such limiting instructions.” *Holland*, 273 N.C. App. at 267, 848 S.E.2d at 285; *see also State v. Whitley*, 311 N.C. 656, 664, 319 S.E.2d 584, 589 (1984) (“The admission without limitation of evidence which is competent for a restricted purpose will not be held to be error in the absence of a request . . . for limiting instructions.”); *State v. Maccia*, 311 N.C. 222, 228-29, 316 S.E.2d 241, 245 (1984) (“Although it is true that the jury was not instructed in the present case to limit its consideration of the evidence to purposes of impeachment, it does not appear from the record that the defendant requested a limiting instruction. The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions.”); *State v. Handsome*, 300 N.C. 313,

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319, 266 S.E.2d 670, 675 (1980) (“[W]here the defendant does not request that the limiting instruction be given, as he did not in this case, it is not error when the instruction is not given.”). As Plaintiff did not request a limiting instruction, the trial court did not commit error by not issuing a limiting instruction regarding the videotape surveillance.

E. Reference to Videotape Surveillance in Defendants’ Closing Argument

¶ 32 [5] Finally, Plaintiff argues Defendants improperly referenced the videotape surveillance in closing, implying Defendants used it as substantive evidence. During closing, Defendants stated:

[DEFENDANTS’ COUNSEL:] You’ve seen the surveillance tapes, and a picture paints 1,000 words. But – and this thing about \$20,000[.00] – \$22,000[.00], how dare you spend \$22,000[.00] following her around, sneaking around videoing her – she attacked Dr. Boone and his livelihood and his profession and his integrity. And on that deposition that you saw on the video, she didn’t know we were going to get all her medical records and double-check, and we were going to do surveillance and double-check. And she attacked him aggressively on that. She said she couldn’t dance anymore *because of his surgery*. Remember that. That’s pretty aggressive.

That’s just a – to attribute her ability to dance to this surgery, given all the past, *is an unfair attack and goes to her credibility. That’s why we showed you all that stuff*. But, to finish my discussion on the law, before we get all that – and I want to show you that videotape again, so you will understand how aggressive the attack was and why the fight back from the defense was proportionate. It was appropriate. This is the second half of the law. I told you that standard of care.

[PLAINTIFF’S COUNSEL:] Objection, Your Honor. This is beyond the jury instructions.

(Emphases added).

¶ 33 Plaintiff did not object to Defendants’ reference to the videotape surveillance during closing, but rather objected to a later reference to the standard of care and the law. Plaintiff’s argument regarding Defendants’

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reference to the videotape surveillance during closing is not preserved for appeal. *See* N.C. R. App. P. 10(a)(1) (2021) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”); *State v. Thompson*, 265 N.C. App. 576, 586, 827 S.E.2d 556, 563 (2019) (holding that a party fails to preserve for appellate review a challenge to remarks made during closing argument in the absence of an objection).

CONCLUSION

¶ 34

The videotape surveillance of Plaintiff was authenticated by her admission that she was both the subject of the videotape and that she was carrying her grandchild at a relevant period of time. The videotape surveillance was used for a proper purpose when Plaintiff opened the door to impeachment through her testimony regarding the current nature of her injury, and the videotape surveillance was relevant for impeachment purposes, as it related to Plaintiff’s credibility as a witness. The trial court was not required to give a limiting instruction regarding the videotape surveillance when Plaintiff did not request such an instruction, and Plaintiff waived her challenge to Defendants’ reference to the videotape surveillance in closing by not objecting to such a reference.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

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IN THE MATTER OF J.R. AND J.C.

No. COA21-207

Filed 21 September 2021

1. Child Abuse, Dependency, and Neglect—permanency planning order—constitutionally protected status as parent—sufficiency of findings

In a neglect and dependency case, the trial court’s permanency planning order awarding guardianship to the children’s grandfather was affirmed where the court’s factual findings supported its conclusion that the mother acted in a manner inconsistent with her constitutionally protected status as a parent and where, contrary to the mother’s argument, the court was not required to find that she had done so willfully. The court found that the children’s neglect adjudication was based on their exposure to their brother’s death, which resulted from abuse in the home by the mother’s boyfriend; the mother avoided taking one of her children to the doctor so the department of social services would not discover the child’s burn wounds, which were also allegedly caused by the boyfriend; and the mother failed to comply with multiple aspects of her case plan, including participation in therapy and domestic violence services.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—verification—guardian’s understanding of legal significance of appointment

In a neglect and dependency case, the trial court’s permanency planning order awarding guardianship to the children’s grandfather was affirmed where the court properly verified—as required under N.C.G.S. §§ 7B-600(c) and 7B-906.1(j)—that the grandfather understood the legal significance of guardianship. Competent evidence at the permanency planning hearing supported the court’s verification, including the court’s thorough colloquy with the grandfather, the grandfather’s testimony, and evidence from a social worker and the guardian ad litem showing that the grandfather had taken good care of the children during the year that they lived with him.

3. Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—sufficiency of evidence

In a neglect and dependency case, the trial court properly ceased reunification efforts with the children’s mother where competent evidence showed that such efforts would be unsuccessful

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or inconsistent with the children's health or safety. Specifically, the mother was not making adequate progress in her family services case plan where she refused to participate in recommended therapy, failed to engage in domestic violence services, and failed to secure proper housing. The circumstances leading to the children's neglect adjudication further supported a cessation of reunification efforts, where the children's younger brother died as a result of abuse in the home by the mother's boyfriend and where the mother had previously concealed the boy's injuries resulting from that abuse from the department of social services.

4. Child Visitation—frequency and duration—failure to specify—limited discretion given to parties

In a neglect and dependency case, where the trial court ceased reunification efforts with the mother and awarded guardianship to the children's grandfather, the court's order providing for the mother's visitation with the children was reversed and remanded where the court failed to specify the minimum frequency and duration of the mother's visits, as required under N.C.G.S. § 7B-905.1(c). Although the order stated that the mother would have supervised visitation for "a minimum of four hours per month," it was unclear whether this provision required a minimum of one visit of four hours per month or multiple shorter visits totaling four hours per month. However, the court did not improperly delegate its judicial authority by leaving the day and time of each visit to be agreed upon by the mother and the grandfather.

Appeal by Respondent-Mother from orders entered 29 December 2020 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 24 August 2021.

Keith Smith for Petitioner-Appellee Mecklenburg County Youth and Family Services.

Parker Poe Adams & Bernstein LLP, by W. Coker Holmes, for Appellee Guardian ad Litem.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for Respondent-Appellant Mother.

COLLINS, Judge.

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¶ 1 Mother appeals from orders awarding guardianship of her sons, James and Justin,¹ to their maternal grandfather and awarding Mother visitation. Mother argues that the trial court erred by concluding that she acted in a manner inconsistent with her constitutionally protected status as a parent, determining that the guardian understood the legal significance of guardianship, ceasing reunification efforts, and failing to specify the minimum frequency and duration of visits. We affirm in part and remand in part for the trial court to specify the minimum frequency and duration of Mother's visitation.

I. Procedural History

¶ 2 Petitioner Mecklenburg County Youth and Family Services filed a juvenile petition on 31 July 2019, alleging that James and Justin were neglected and dependent. On 17 October 2019, the trial court entered an order adjudicating James and Justin neglected and dependent and a disposition order. The trial court placed the juveniles with Petitioner, established the primary plan as reunification with the juveniles' parents, and established a secondary plan of guardianship.

¶ 3 The trial court held a permanency planning hearing on 11 December 2020. Following the hearing, the trial court entered a Permanency Planning Hearing Order, a Guardianship Order, and a Guardianship Visitation Order. The orders placed the juveniles in the guardianship of their maternal grandfather, ceased reunification efforts, awarded Mother visitation, and waived further statutory review hearings. Mother timely gave notice of appeal.²

1. We use pseudonyms for all minors in this opinion to protect their identities. *See* N.C. R. App. P. 42(b).

2. Both the Permanency Planning Hearing Order and the Guardianship Visitation Order contain the visitation provisions Mother challenges, but Mother's two notices of appeal did not specifically designate the Guardianship Visitation Order as an order from which she appeals. *See* N.C. R. App. P. 3(d) (notice of appeal must "designate the judgment or order from which appeal is taken"). However, "[i]t is well established that a mistake in designating the order appealed from should not result in loss of the appeal as long as the intent to appeal from a specific [order] can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation and quotation marks omitted). Mother's intent to appeal the trial court's award of visitation is clear from her second notice of appeal and there is no indication that either appellee was misled by the mistake. We will therefore review Mother's challenge to the visitation provisions found in both the Permanency Planning Hearing Order and the Guardianship Visitation Order.

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II. Factual Background

¶ 4 Mother has had four children: Justin in 2015, James in 2016, Jackson in 2017, and Mary in 2020.³ Mother has a history of child protective service agency involvement with her children beginning in October 2015. Petitioner referred Mother to services, including domestic violence and mental health services, in October 2015, October 2016, April 2017, January 2018, December 2018, and April 2019.

¶ 5 In July 2019, Jackson was burned, allegedly in a bath, while in the custody of Mother's boyfriend Daquan McFadden. Mother called a medical hotline to seek treatment advice in lieu of taking Jackson to the doctor because she wanted to avoid further DSS involvement.

¶ 6 On 29 July 2019, Mother and McFadden were staying at a hotel with James, Justin, and Jackson. Mother left the hotel room from about 8 p.m. to midnight. When she returned to the hotel room, where McFadden had remained with the children in her absence, she went to sleep. The next morning, Officer Mike Dashti of the Charlotte Mecklenburg Police Department responded to a 911 call from the hotel room. Dashti arrived and observed Mother on the phone with 911. Dashti found Jackson lying on the bathroom floor unresponsive, with no pulse, and cold to the touch. Dashti observed blood on Jackson's nose and face, a bruise on Jackson's forehead, and a 10-to-12-inch bloodstain on a pillow on one of the beds.

¶ 7 Resuscitation efforts were unsuccessful and Jackson was pronounced dead at the hospital. An autopsy indicated that Jackson had suffered a

blunt force injury to his head, a large subdural hematoma, a hematoma to his liver, facial abrasions and head contusions on his forehead and lip area, a bite mark on his left shoulder, and lesions healing on his scrotum and buttocks.

The autopsy concluded that Jackson's manner of death was homicide, caused by "an acute blunt force trauma injury[.]"

¶ 8 Mother was charged with felony child abuse; McFadden was charged with Jackson's murder. The State dismissed the criminal charge against Mother on 31 August 2020.

3. James' and Justin's fathers are not parties to this appeal.

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¶ 9 Petitioner filed the juvenile petition on 31 July 2019, alleging that James and Justin were neglected and dependent, and the trial court awarded Petitioner nonsecure custody. Petitioner initially placed James and Justin in a home where both their fathers lived. On 17 October 2019, the trial court adjudicated James and Justin neglected and dependent and entered a disposition order. The trial court maintained the juveniles in Petitioner's custody and established the primary plan as reunification with the juveniles' parents, with a secondary plan of guardianship. In December 2019, Petitioner placed James and Justin with their maternal grandfather after allegations that James' father hit Justin.

¶ 10 Prior to the adjudication hearing, Petitioner prepared a proposed Family Services Agreement ("case plan") for Mother. The trial court adopted this case plan in its adjudication order. The case plan required Mother to, inter alia, (1) complete a "F.I.R.S.T." assessment;⁴ (2) "comply with mental health treatment, [] follow all therapeutic recommendations[,] and take any necessary medication as prescribed; (3) complete parenting classes; (4) obtain employment to meet the juveniles' basic needs; and (5) "maintain an appropriate, safe, and stable living environment for herself and her children[.]"

¶ 11 The trial court held a permanency planning hearing on 11 December 2020. Following the hearing, the trial court entered a Permanency Planning Hearing Order, a Guardianship Order, and a Guardianship Visitation Order. In the Permanency Planning Hearing Order, the trial court made the following findings of fact regarding Mother's progress on her case plan:

16. The mother is employed at Wal-Mart but has reduced her hours from 30 to 20 because of her SSI. She receives approximately \$790 per month in SSI. The mother completed parenting classes . . . on June 30, 2020. The mother is living with a family friend and paying rent. She has her own room with a queen bed and room for her and her baby [Mary] It is not appropriate for these two juveniles as it is not big enough. The mother had a F.I.R.S.T. assessment on April 23, 2020. The mother was recommended to undergo an assessment and drug screen at Anuvia; however, she refused and hung up on the F.I.R.S.T. program staff. The drug screen is a part of the screening process with F.I.R.S.T. The mother was referred

4. The record does not include a definition of this acronym.

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to Family First for a substance abuse assessment on at least three separate occasions (5/15/2020, 9/24/2020, and 10/29/2020). On all three occasions, she refused treatment. She did follow through with being assessed during the last referral on November 13, 2020 and was recommended to receive both Outpatient Therapy at a frequency of two times per week and Trauma Therapy; however, the mother informed . . . the assessing clinician, that she did not believe in therapy and did not want to engage. The mother has been discharged twice from Family First and is subject to be discharged on December 14, 2020 if she does not respond. She has also not signed her Person-Centered Plan which needs to be signed before the treatment services can begin. A referral was made to Thrive for a mental health assessment. The mother has not done a mental health assessment at this time. The mother has consistently maintained with professionals that she did not think therapy was appropriate for her. The mother has also not engaged in domestic violence services at this time.

. . . .

21.f. Despite recommendations, the mother has consistently stated she will not take part in mental health services despite concerns on her behavior, temper, and grief of loss of her child.

21.h. Mother does not have housing that can meet the needs of these juveniles.

21.i. She is renting a room from a friend that has a Queen bed and pack and play for [Mary].

. . . .

21.k. [Mother's] criminal case was dismissed on August 31, 2020 and since then minimal progress was made by the mother on her case plan.

21.l. The court does not have confidence that the mother will follow through with the items of the case plan. While the court understands she was not able to do certain things on her plan due to pending criminal

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charges, her many other actions and statements indicate she will not follow through with the services.

....

22.b. The mother is not making adequate progress within a reasonable time under the plan.

....

22.i. The mother is acting in a manner inconsistent with the health or safety of the juveniles.

¶ 12 The trial court concluded that Mother had “acted in a manner inconsistent with [her] constitutionally protected rights as a parent.” The trial court also found that further reunification efforts “clearly would be unsuccessful or would be inconsistent with the juveniles’ health and safety and need for a safe, permanent home within a reasonable period of time.” The trial court determined that the maternal grandfather was “ready and able to accept the guardianship of the juveniles,” “under[stood] the legal significance of the appointment and has adequate resources to care appropriately for the juveniles.” The trial court therefore ceased reunification efforts and appointed the maternal grandfather the guardian of the juveniles.

¶ 13 In the Permanency Planning Hearing Order and Guardianship Visitation Order, the trial court awarded Mother multiple forms of visitation. The trial court awarded Mother “regular visitation” as follows:

[Mother] shall have supervised visitation with the minor children to occur a minimum of four hours per month. The visits are to be supervised by [the maternal grandfather] or an approved responsible adult. The day and time of each visit will be agreed upon between [Mother and the maternal grandfather].

Mother appeals.

III. Discussion

A. Award of Guardianship

¶ 14 Mother challenges the Permanency Planning Hearing Order’s award of guardianship of the juveniles to their maternal grandfather. “This Court’s review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law.” *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). Unchallenged

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findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). We review de novo the conclusion of law that a parent acted in a manner inconsistent with the constitutionally protected status of a parent. *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018).

1. Actions Inconsistent with Mother's Constitutionally Protected Status as a Parent

¶ 15 **[1]** Mother first argues that the trial court erred by concluding that she acted in a manner inconsistent with her constitutionally protected status as a parent. Specifically, Mother contends that actions inconsistent with the constitutionally protected status of a parent must be “willful, volitional actions of the parent.” Mother argues that findings in the trial court’s Permanency Planning Hearing Order are therefore deficient because they do not address whether her cognitive “limitations affected her allegedly inconsistent conduct or whether [she] could even appreciate the consequences of her conduct such that she could intentionally and willfully engage in conduct that is truly inconsistent with that of a parent.”

¶ 16 At a permanency planning hearing, the court may set guardianship as the juvenile’s permanent plan and appoint a guardian for the juvenile if the court finds that doing so is in the juvenile’s best interests. N.C. Gen. Stat. §§ 7B-906.2(a)(3) (2020); 7B-600(a) (2020). However, a natural parent has a “constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child[.]” *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). This constitutionally protected interest “is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.” *Id.* “Prior to granting guardianship of a child to a nonparent, a district court must clearly address whether [the] respondent is unfit as a parent or if [her] conduct has been inconsistent with [her] constitutionally protected status as a parent[.]” *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (quotation marks and citation omitted).⁵

¶ 17 In support of her argument that the trial court was required to find that her conduct was willful and intentional, Mother cites *In re A.L.L.*, 376 N.C. 99, 852 S.E.2d 1 (2020). *In re A.L.L.* is inapposite, however,

5. While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B. *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011).

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because it concerned the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(7), not the appointment of a guardian under sections 7B-600(a) and 7B-906.2(a)(3). *See In re A.L.L.*, 376 N.C. at 110-11, 852 S.E.2d at 9. Unlike the statutes at issue in the present case, section 7B-1111(a)(7) expressly requires “willful” abandonment of a juvenile or “voluntary” abandonment of an infant. N.C. Gen. Stat. § 7B-1111(a)(7) (2020).

¶ 18 Mother also cites *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E.2d 235 (2011), but *Rodriguez* is likewise inapposite. In *Rodriguez*, the paternal grandparents sued the natural mother for custody under Chapter 50 and the trial court awarded visitation. *Id.* at 269, 710 S.E.2d at 237-38. We held that the trial court erred by concluding that the mother had acted inconsistently with her constitutionally protected status as a parent because the juveniles had previously been adjudicated dependent, but not abused or neglected, and there were no additional findings of fact sufficient to show that the mother had acted inconsistently with her status as a parent. *Id.* at 279, 710 S.E.2d at 243.

¶ 19 Here, by contrast, the trial court adjudicated James and Justin neglected and dependent, and Mother does not challenge this adjudication. Neglect “clearly constitute[s] conduct inconsistent with the protected status parents may enjoy.” *Price*, 346 N.C. at 79, 484 S.E.2d at 534. The neglect adjudication was premised on a finding that the juveniles lived “in an environment injurious to their welfare because they were exposed to the homicide of their brother, [Jackson], and live[d] in the home where their brother died as a result of abuse.” The trial court further found that Mother had previously called a medical hotline for advice on treating a burn on Jackson “instead of taking the child to the doctor because she did not want another DSS case.”

¶ 20 Moreover, following the permanency planning hearing, the trial court found that Mother had failed to comply with multiple aspects of her case plan. Specifically, the trial court found that Mother’s housing was insufficient for James and Justin because it was too small; Mother repeatedly refused to engage in therapy and other assessments; Mother indicated that she “did not believe in therapy and did not want to engage”; and Mother did not engage in domestic violence services.

¶ 21 Mother argues that “[t]he evidence does not support the finding that [Mother] is not actively participating in and cooperating with the plan because so much of the plan bears no logical nexus to the reasons why James and Justin came into custody.” This argument is foreclosed by Mother’s failure to challenge the trial court’s adjudication order wherein

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the trial court specifically found that the case plan was “in the [children’s] best interests and appropriate to address the issues that led to the [children’s] placement[.]” This unchallenged finding of fact is binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

¶ 22 Together, the trial court’s findings of fact support the conclusion of law that Mother had acted in a manner inconsistent with her constitutionally protected status as a parent. The trial court did not err by applying the best interest of the juvenile standard and awarding guardianship.

2. Verification under N.C. Gen. Stat. §§ 7B-600(c) and 7B-906.1(j)

¶ 23 [2] Mother also argues that the trial court erred by concluding that the maternal grandfather understood the legal significance of guardianship as required by N.C. Gen. Stat. §§ 7B-600(c) and 7B-906.1(j).

¶ 24 Prior to appointing a guardian under Chapter 7B, “the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile.” N.C. Gen. Stat. § 7B-600(c) (2020); *see also* N.C. Gen. Stat. § 7B-906.1(j) (2020) (same). “The Juvenile Code does not require that the court make any specific findings in order to make the verification. It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship.” *In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) (quotation marks and citations omitted). At a permanency planning hearing “[t]he court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-906.1(c). This evidence may include reports and home studies conducted by the guardian ad litem or department of social services. *See In re J.E., B.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007) (trial court which received and considered department of social services home study reports complied with section 7B-600).

¶ 25 The trial court conducted the following colloquy with the maternal grandfather at the permanency planning hearing:

THE COURT: Mr. Steele, do you understand that, if I appoint you the guardian of these two children that, first and foremost, you would be the one mainly financially responsible for them? That’s on you.

MR. STEELE: Right.

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THE COURT: Do you understand that?

MR. STEELE: Yes.

THE COURT: All right. And you understand that, if I appoint you the guardian, that you would have the care, custody, and control of the juvenile[s] and may arrange for a suitable placement for the juvenile[s]? Do you understand that?

MR. STEELE: A suitable placement?

THE COURT: Yes, sir.

MR. STEELE: What do you mean by that?

THE COURT: That means that you would be responsible for providing any type of placement for them.

MR. STEELE: Yes.

THE COURT: Okay. And that you may also represent the juvenile[s] in legal actions before any court. Do you understand that?

MR. STEELE: Yes.

THE COURT: Do you understand that you may consent to certain actions on the part of the juvenile[s] in place of the parent, including marriage, enlisting in the armed forces of the United States, and enrolling in school?

MR. STEELE: Yes.

THE COURT: Do you also understand that, if I appoint you the guardian, that you may consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile[s]?

MR. STEELE: Yes.

¶ 26 Social worker Cawan Jenkins also testified that the maternal grandfather “underst[ood] what guardianship would entail[.]” Moreover, Jenkins’ court summaries, the guardian ad litem’s two reports, and the maternal grandfather’s testimony reflect that James and Justin had lived with the maternal grandfather for approximately one year. During that time, the maternal grandfather took the juveniles to medical and therapy appointments, ensured their visitation with their parents, and financially provided for the juveniles.

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¶ 27 Finally, the maternal grandfather testified as follows on direct examination:

Q. You're aware that [Petitioner] is recommending that the Court grant you guardianship of the juveniles today?

A. Yes.

....

Q. What is your understanding of the legal significance of the appointment of guardianship?

A. I mean . . . I think that word speaks for itself, "guardianship." I got to be there for them. It's no off day. It's no off day. I've got to be there for them. Like they're just kids. They're little boys, so it's all on me. I mean I hope I'm wording this right, but it's all on me to walk them through the steps. . . .

It's all on me to walk them through the steps, hold their hand, and you know, try and get them by this, past this. Make sure their appointments are there. Consistently make sure they have a place to stay, you know, like they have been. It's a lot of stuff with it, and there's no day off. There's no day off.

¶ 28 The trial court's colloquy with the maternal grandfather, the maternal grandfather's testimony, and the evidence submitted by the social worker and guardian ad litem was competent evidence in support of the trial court's conclusion that the maternal grandfather "understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile[s]." The trial court did not err in making the verification required by sections 7B-600(c) and 7B-906.1(j).

B. Cessation of Reunification Efforts

¶ 29 **[3]** Mother argues that the trial court erred by ceasing reunification efforts because the record does not show that such efforts clearly would be unsuccessful or inconsistent with the juveniles' health or safety.

¶ 30 "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re M.T.-L.Y.*, 265 N.C. App. 454, 466, 829 S.E.2d 496, 505 (2019) (citation omitted).

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¶ 31 At any permanency planning hearing, the trial court may cease reunification efforts upon making “written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile’s health or safety.” N.C. Gen. Stat. § 7B-906.2(b). To determine whether reunification efforts “clearly would be unsuccessful or would be inconsistent with the juvenile’s health or safety,” the trial court must make written findings concerning:

(1) Whether the parent is making adequate progress within a reasonable period of time under the plan.

(2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.

(3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.

(4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d); *In re D.C.*, 275 N.C. App. 26, 29, 852 S.E.2d 694, 697 (2020).

¶ 32 Here, the trial court found that reunification efforts with Mother “clearly would be unsuccessful or would be inconsistent with the juveniles’ health and safety and need for a safe, permanent home within a reasonable period of time.” The trial court also made the following findings, as required by section 7B-906.2(d):

22.b. The mother is not making adequate progress within a reasonable time under the plan.

....

22.e. The mother is not actively participating in and cooperating with the plan, YFS and the guardian *ad litem* for the juveniles.

....

22.g. The mother . . . [has] remained available to the Court, YFS, and [the] guardian *ad litem* for the juveniles.

....

22.i. The mother is acting in a manner inconsistent with the health or safety of the juveniles.

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Mother acknowledges that these findings comply with section 7B-906.2(d), but argues that they are unsupported or contradicted by evidence in the record. We disagree.

¶ 33

Credible evidence in the record supports the findings that Mother was not making adequate progress within a reasonable time under her case plan and was not actively participating in and cooperating with the plan, Petitioner, and the guardian ad litem. A court summary prepared by social worker Jenkins and admitted into evidence indicated that Mother refused to complete recommended mental health assessments and drug screenings on multiple occasions. The trial court also admitted into evidence a letter from a Family First Program Manager stating that

[Mother] was referred to Family First on at least 3 separate occasions: 5/15/20, 9/24/20 and 10/29/20. On all three occasions, [Mother] refused treatment. She did follow through with being assessed during the last referral on 11/13/20 and was recommended to receive both OPT at a frequency of 2x per week and Trauma Therapy; however, [Mother] informed [the] assessing clinician, that she did not believe in therapy and did not want to engage. Please note that [Mother] was discharged twice and currently her case is still open and subject to be discharged on 12/14/20 if she does not respond. She also has yet to sign her Person-Centered Plan (PCP) which needs to be signed by [Mother] and service order approved before treatment services can begin.

¶ 34

Jenkins' summary also reflected that Mother had not engaged in domestic violence services despite a history of domestic violence with child protective service involvement. At the permanency planning hearing, Jenkins testified that Mother failed to follow through with the recommendations of the assessments she did complete, "which include[d] substance abuse services, outpatient services as well as a mental health assessment." The guardian ad litem's two reports, which were also admitted into evidence, reflect that Mother had "outbursts of anger and yelling" towards the social worker supervising her video visitation with the juveniles in July 2020; Mother had "not sought Mental health services to assess her needs"; and "[w]ith further explanation, [Mother] seemed to understand how therapy or counseling may help her be her best for herself and her children, but in the next conversation, she would again argue the need for it." Mother suggests that her cooperation with the case plan was hindered by her pending criminal charge,

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but does not challenge the trial court's finding that she made minimal progress on her case plan even after the charge was dismissed on 31 August 2021.

¶ 35 Credible evidence also supports the finding that Mother was “acting in a manner inconsistent with the health or safety of the juveniles.” The trial court found that James and Justin were previously adjudicated neglected and dependent based on the circumstances of Jackson's death, James and Justin's exposure to Jackson's death, and Mother's decision not to seek medical treatment for Jackson's burns to avoid further DSS involvement. Mother also failed to secure appropriate housing for James and Justin to live with her. Specifically, the social worker testified that the room where Mother was staying was not appropriate for James and Justin to join her because there was not enough space.

¶ 36 Mother contends that her continued custody of Mary contradicts the trial court's finding that she was acting in a manner inconsistent with the juveniles' health or safety. The trial court had discretion to weigh this evidence, *In re T.H.*, 266 N.C. App. 41, 45, 832 S.E.2d 162, 165 (2019), and could consider it in light of the active child protective service involvement with Mary at the time of the permanency planning hearing and evidence that Mother asks her father to babysit Mary “for days at a time.”

¶ 37 The trial court's finding that further reunification efforts clearly would be unsuccessful or would be inconsistent with the juveniles' health or safety was supported by credible evidence in the record, and these findings support the trial court's cessation of reunification efforts.

C. Visitation Order

¶ 38 [4] Lastly, Mother argues that the trial court violated N.C. Gen. Stat. § 7B-905.1(c) by failing to specify the minimum frequency and duration of her visits with James and Justin.

¶ 39 “This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion.” *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citations omitted). Where the trial court places the juvenile with a guardian, “any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.” N.C. Gen. Stat. § 7B-905.1(c) (2020).

¶ 40 The trial court's Visitation Order provides that Mother

shall have supervised visitation with the minor children to occur a minimum of four hours per month.

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The visits are to be supervised by [the maternal grandfather] or an approved responsible adult. The day and time of each visit will be agreed upon between [Mother] and [the maternal grandfather].

¶ 41 This provision can be read to require a minimum of one visit of four hours per month, or it can be read to require multiple visits of shorter duration for a total of four hours per month. Throughout much of the history of the case, Mother's supervised visitation was two hours, twice per month. The Guardian ad Litem recommended supervised visitation twice per month. Petitioner's court report referred to supervised visitation "twice per month for a total of two hours each time." When rendering the order, the trial court stated that it was "going to adopt the visitation plan that was submitted by [Petitioner][,]" which provided for supervised "visitation with the minor children to occur a minimum of four hours per month."

¶ 42 Although the Visitation Order's provision did specify a minimum amount of visitation of 4 hours per month, the provision does not unambiguously articulate the minimum frequency and length of the visits. Accordingly, we remand for the trial court to set the minimum frequency of the visitation, as required by section 7B-905.1(c).

¶ 43 Mother also argues that the visitation order amounts to an impermissible delegation of judicial authority. We disagree. "While our case law recognizes that some decision-making authority may be ceded to the parties with respect to visitation, it also reveals that an order is less likely to be sustained as judicially-imposed structure decreases and the decision-making party's unfettered discretion increases." *Peters v. Pennington*, 210 N.C. App. 1, 20, 707 S.E.2d 724, 738 (2011). In this case, the trial court did not grant the guardian any unfettered discretion to modify or suspend visitation. Instead, the trial court left only the day and time of each visit to be agreed upon by Mother and the guardian. The trial court did not abuse its discretion by granting this limited degree of flexibility to the parties.

IV. Conclusion

¶ 44 The trial court's findings of fact supported its conclusion of law that Mother acted inconsistently with her constitutionally protected status, and the trial court appropriately verified the maternal grandfather's understanding of the legal significance of guardianship. Accordingly, the trial court did not err in awarding guardianship of James and Justin to the maternal grandfather. The trial court did not err by ceasing reunification efforts and did not impermissibly delegate judicial authority in its

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award of visitation. We remand to the trial court to specify the minimum frequency and duration of visitation as required by section 7B-905.1(c).

AFFIRMED IN PART, REMANDED IN PART.

Chief Judge STROUD and Judge DIETZ concur.

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No. COA20-828

Filed 21 September 2021

Mental Illness— involuntary commitment— sufficiency of findings and evidence— threat to others

The trial court’s involuntary commitment order declaring respondent to be mentally ill and dangerous to others was reversed where, as the State conceded, the trial court’s findings and the evidence—the attending psychiatrist’s conclusory opinion, an incomplete involuntary commitment recommendation form, and respondent’s testimony—were inadequate to support a conclusion that respondent, who allegedly had threatened a judge, was dangerous to others.

Appeal by Respondent from order entered 10 July 2020 by Judge Richard S. Holloway in Burke County District Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. McKee, for the State.

Carella Legal Services, PLLC, by John F. Carella, for Respondent-Appellant K.V.

INMAN, Judge.

¶ 1 Respondent-Appellant K.V. (“Mr. Vickers”)¹ appeals from an involuntary commitment order declaring him mentally ill and dangerous to

1. We use a pseudonym to protect the privacy of the respondent and for ease of reading.

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others. The State concedes, and we agree, that the record evidence and the trial court's findings are insufficient to support the conclusion that Mr. Vickers was dangerous to others. We reverse the involuntary commitment order.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 Mr. Vickers was arrested in Polkton, North Carolina, on 19 April 2019 and charged with threatening a judge presiding in a child welfare case. He was incarcerated pending trial. Fourteen months later, in June 2020, he was deemed incapable to proceed as a defendant in the criminal prosecution and was involuntarily committed to Broughton Hospital. He was reexamined upon admission, and the admitting psychiatrist recommended further involuntary commitment for up to 30 days. The psychiatrist, however, failed to indicate which statutory basis supported further involuntary commitment. The examination form noted Mr. Vickers had allegedly threatened a judge and was “dangerous,” but failed to indicate whether he was a threat to himself or others and did not include any basis for deeming him dangerous.

¶ 3 The trial court held a hearing on the involuntary commitment recommendation on 10 July 2020. The attending psychiatrist at Broughton Hospital testified for the State, opining that Mr. Vickers: (1) suffered from an unspecified psychotic disorder; (2) was not dangerous to himself; and (3) was a danger to others. However, the psychiatrist further testified that Mr. Vickers “has not been aggressive or self injurious,” and had not made any threats to others since his admission. She also testified that she had not forced medication on Mr. Vickers because “[i]t’s unethical to force medication on a patient *who is not a danger to himself or others.*” (emphasis added). The State offered no evidence about Mr. Vickers’s conduct during his fourteen months in the Rowan County Jail immediately preceding his admission to Broughton Hospital.

¶ 4 Mr. Vickers testified that he had no history of mental illness and denied making a “true threat” against a judge. He testified that he made no threat in court or in the presence of the judge, but posted a “Facebook rant” expressing his feelings about “what happened in the past to the Court and how my family got divided because of a bunch of falsehoods and lies meant to destroy my family.”

¶ 5 The trial court entered an order involuntarily committing Mr. Vickers for an additional fourteen days based on conclusions that Mr. Vickers suffered from a mental illness and was dangerous to others. In support of its conclusions, the trial court recited the attending psychiatrist’s testimony that Mr. Vickers suffered from an unspecified

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psychiatric disorder, had refused medication, and had cursed at Broughton Hospital staff. Mr. Vickers appealed.

II. ANALYSIS

¶ 6 Mr. Vickers contends that the involuntary commitment order must be vacated without remand because the trial court failed to find—and the evidentiary record does not disclose—facts showing him to be dangerous to others. The State concedes both issues.

¶ 7 In order to involuntarily commit an individual as mentally ill and dangerous to others, a trial court must make findings based on clear, cogent, and convincing evidence showing that:

[w]ithin the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated.

N.C. Gen. Stat. § 122C-3(11)(b) (2019); *see also* N.C. Gen. Stat. § 122C-268(j) (2019) (imposing the clear, cogent, and convincing evidence standard to determinations of dangerousness to others). The State concedes that the trial court’s findings were inadequate to support a conclusion of dangerousness to others. It further concedes that the evidence presented to the trial court—the attending psychiatrist’s conclusory opinion,² the incomplete 29 June 2020 involuntary commitment recommendation form, and Mr. Vickers’s testimony—fails to clearly, cogently, and convincingly show Mr. Vickers was a threat to others. The State likewise agrees that it is appropriate to set aside the trial court’s order without remand under these circumstances. *See, e.g., In re N.U.*, 270 N.C. App. 427, 433, 840 S.E.2d 296, 300-01 (2020) (“As neither the record evidence nor the findings of fact support the trial court’s conclusion that Respondent was dangerous . . . , we reverse the trial court’s involuntary commitment order.”).

¶ 8 Because we are convinced that no reasonable trier of fact could find that Mr. Vickers was a danger to himself or others within the scope of the involuntary commitment statute, we reverse, rather than vacate, the

2. In a later order dismissing another involuntary commitment hearing held on 24 July 2020, the trial court found that the attending psychiatrist’s conclusion that Mr. Vickers was dangerous to others was “not based in the relevant past and [was] conclusory and [did] not provide clear findings that substantiate mental illness and dangerousness.”

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trial court's order. *Id.*; see also *In re Booker*, 193 N.C. App. 433, 437, 667 S.E.2d 302, 305 (2008) (holding that when the facts found by the trial court do not support a determination of dangerousness to self or others, "we must reverse the trial court's order" (citation omitted)).

III. CONCLUSION

¶ 9 For the foregoing reasons, we reverse the involuntary commitment order.

REVERSED.

Judges DIETZ and GRIFFIN concur.

D.C. AND J.M., *Guardian Ad Litem for minor child* D.C., PLAINTIFF

v.

D.C., DEFENDANT

E.C. AND J.M., *Guardian Ad Litem for minor child* E.C., PLAINTIFF

v.

D.C., DEFENDANT

Nos. COA21-140, COA21-141

Filed 21 September 2021

Domestic Violence—protective order—sought by minors against step-parent—denied—no findings of fact

In a consolidated appeal from the denial of two minors' motions for a domestic violence protective order against their father's wife, where the trial court did not make any findings of fact, the orders were vacated and the matters remanded for entry of new orders with findings of fact and appropriate conclusions of law.

Appeals by Plaintiffs from orders entered 23 September 2020 by Judge S. A. Grossman in Cabarrus County District Court. By order entered 12 March 2021 this Court allowed cases COA21-140 and COA21-141 to be consolidated for purposes of hearing only. This Court now orders that COA21-140 and COA21-141 be consolidated for decision in this opinion. Heard in the Court of Appeals 10 August 2021.

Hartsell & Williams, P.A., by Austin "Dutch" Entwistle III, for plaintiffs-appellants.

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No appellee brief filed.

MURPHY, Judge.

¶ 1 When a trial court sits without a jury in a hearing regarding a motion for a domestic violence protection order under Chapter 50B of our General Statutes, Rule 52(a)(1) of the North Carolina Rules of Civil Procedure requires the trial court to make findings of fact, as well as separately state its conclusions of law based on those findings of fact. After making the required findings of fact and conclusions of law, the trial court “shall” direct the entry of the appropriate judgment.

¶ 2 Here, after a consolidated hearing without a jury, the trial court failed to make any findings of fact in its orders denying Plaintiffs’ motions for domestic violence protective orders against Defendant. We vacate the trial court’s orders in this matter and remand for the entry of findings of fact by the trial court, followed by appropriate conclusions of law.

BACKGROUND

¶ 3 Plaintiffs D.C.¹ and E.C., who are minors, each filed a *Complaint and Motion for Domestic Violence Protective Order* against their biological father’s wife, Defendant D.C., on 16 July 2020. The hearing regarding whether to grant a Domestic Violence Protective Order (“DVPO”) was consolidated. At the time of the hearing, a Chapter 50 custody dispute was ongoing between Plaintiffs’ biological mother, J.M., and Plaintiffs’ biological father, D.C.

¶ 4 In their nearly identical Complaints, Plaintiffs alleged:

[Defendant] has repeatedly gotten right in [Plaintiffs’] face[s] screaming as loud as she can as [to] how she wants to knock [Plaintiffs’] teeth out or otherwise do bodily harm to [Plaintiffs]. [Plaintiffs] have witnessed [Defendant] hit [Plaintiffs’ biological father] and also hit her grandson []. The most recent time [Defendant] got in [Plaintiffs’] face[s] yelling and threatening [them] was on or about [8 July 2020]. [Plaintiffs are] afraid for [their] safety and in fear of continued harassment such that [they are] suffering substantial emotional distress and don’t want [Defendant] to be

1. Abbreviations are used for all relevant persons throughout this opinion to protect the identity of the juveniles and for ease of reading.

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around [them] at all anymore. Besides [] witnessing [Defendant] actually hitting or otherwise physically attacking [their biological father] and her grandson, [Defendant] has destroyed property in fits of rage at least in part to intimidate [Plaintiffs]. [Defendant] has repeatedly acted [to invoke fear in Plaintiffs] and it has been successful. [Plaintiffs are] in fear for [their] [lives]from [Defendant].

¶ 5 The trial court granted an *Ex Parte Domestic Violence Order of Protection* for each Plaintiff on 17 July 2020 (“*Ex Parte Orders*”), which prohibited Defendant from contact with Plaintiffs. The *Ex Parte Orders* were continued to the date of the hearing.

¶ 6 At the hearing regarding Plaintiffs’ DVPO motions on 23 September 2020, Plaintiffs separately testified as follows: Defendant gets up close and in their faces, threatens physical assault, and scares them; Defendant threatened to knock one Plaintiff’s teeth out; Plaintiffs believe Defendant would actually physically harm them; and they believe Defendant would continue her behavior if Plaintiffs returned to her home. Defendant did not present any evidence.

¶ 7 The trial court used the DVPO form provided by the Administrative Office of the Courts, AOC-CV-306, which provides multiple locations for the trial judge to include preprinted and freeform findings of fact, to enter its orders. At the conclusion of the bench hearing on Plaintiffs’ motions for a DVPO, the trial court entered its orders on the form entitled *Domestic Violence Order of Protection* for each plaintiff on 23 September 2020 (“Orders”). In the Orders, the trial court did not make any findings of fact other than who was present at the hearing, concluded that each Plaintiff “failed to prove grounds for issuance of a [DVPO],” and dismissed the action, declaring “any ex parte order issued in this case [] null and void.”

¶ 8 After the parties rested at the hearing, the trial court made the following comments in open court²:

2. Plaintiffs raise concerns in their briefs suggesting that the trial court misapprehended the law. We note that on the cold record the trial court’s statements could be interpreted as a misapprehension or misapplication of the law. However, due to our resolution of this appeal, we need not address this issue and believe it is quite possible that the comments were made in a conversational style in order to politely engage with the litigants and were not an expression of any misconceptions that the trial court may have had. In order to fully dispel any concerns upon remand, we provide the following observations. First, Chapter 50 and Chapter 50B actions are not mutually exclusive. See N.C.G.S. § 50B-7(a) (2019) (emphasis added) (“The remedies provided by [Chapter 50B] are *not exclusive but*

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Honestly, [Defendant's] conduct is not conducive to working these things out as [they] need to be worked out for the benefit of [Plaintiffs]. I suspect [Defendant] now realizes that, but I think this is a Chapter 50 [custody dispute] case, [Plaintiffs' counsel]. This is not a Chapter [50B domestic violence] case. There's -- if it were [a Chapter 50B case], virtually every parent ever would be in the courtroom.

What I heard from [Plaintiffs], and I commend you for taking your feelings and trying to do the right thing, I don't think this is the right thing. I appreciate that you're looking out after yourselves, both of you young people, but this is a situation where a parent, and [Defendant] is in a position of a parent, has been somewhat out of control, but I don't see that this is much different than what at least 50 percent of all parents have done, stupidly, but this is [a] Chapter 50 action. I'm going to deny the orders in all cases.

¶ 9 Both Plaintiffs timely appealed. In this consolidated appeal,³ Plaintiffs argue each "Order is [facially] defective as the trial court made no findings of fact." Plaintiffs also argue the trial court's "comments . . . at the hearing reveal that [its] basis for denying [Plaintiffs'] claims ha[d] no basis in law or fact."

ANALYSIS

¶ 10 Typically, "[w]hen the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Kennedy v. Morgan*, 221 N.C. App. 219, 220-21, 726 S.E.2d 193, 195 (2012). However, Rule 52(a)(1) of the North Carolina Rules of Civil Procedure requires, "[i]n all actions tried upon the facts without a jury or with an advisory

are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes."). Second, if a trial court determines that an act qualifying as domestic violence occurred, the trial court is required to issue a DVPO. *See* N.C.G.S. § 50B-3(a) (2019) (emphasis added) ("If the [trial] court . . . finds that an act of domestic violence has occurred, the [trial] court *shall grant* a [DVPO] restraining the defendant from further acts of domestic violence.").

3. Although Plaintiffs pursued two separate appeals, COA21-140 and COA21-141, given the similarity of the facts and issues, and for purposes of judicial economy, we consolidate the appeals.

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jury, the [trial] court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” N.C.G.S. § 1A-1, Rule 52(a)(1) (2019).

¶ 11

Our Supreme Court has interpreted this requirement as follows:

Where, as here, the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. The purpose of the requirement that the [trial] court make findings of those specific facts which support its ultimate disposition of the case is to *allow a reviewing court to determine from the record whether the judgment – and the legal conclusions which underlie it – represent a correct application of the law.* The requirement for appropriately detailed findings *is thus not a mere formality or a rule of empty ritual*; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

. . . .

In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

. . . .

Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of

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the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 712-14, 268 S.E.2d 185, 188-90 (1980) (emphases added and original emphases omitted) (marks and citations omitted).

¶ 12 Here, the trial court failed to make any findings of fact, much less specific findings, in the Orders. It was required to enter findings of fact supporting its conclusions of law that each Plaintiff “failed to prove grounds for issuance of a [DVPO].” Such a failure to make findings of fact prevents us from conducting meaningful appellate review, and we must vacate the Orders and remand to the trial court for the entry of orders that comply with the North Carolina Rules of Civil Procedure and our caselaw.

CONCLUSION

¶ 13 The importance of the policy behind the rule in *Coble* is clear here, where the trial court included no findings of fact in the Orders denying Plaintiffs’ motions for DVPOs. We vacate the Orders due to the failure to make findings of fact, and we remand for entry of new orders that include findings of fact and conclusions of law based on those findings.

VACATED AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

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STATE OF NORTH CAROLINA

v.

NANCY BENGE AUSTIN

No. COA20-198

Filed 21 September 2021

1. Homicide—castle doctrine defense—questions of fact regarding applicability—for jury to decide

The trial court did not err by declining to adjudicate defendant's castle doctrine defense to her first-degree murder charge in a pre-trial hearing, and defendant's argument that the castle doctrine statute's use of the word "immunity" meant that the issue had to be resolved by the judge rather than the jury was meritless. There were questions of fact regarding the applicability of the defense, and the trial court properly permitted the case to proceed to jury trial.

2. Homicide—sufficiency of evidence—castle doctrine defense—premeditation and deliberation—unarmed victim pleading on ground

There was sufficient evidence for the jury to convict defendant of first-degree murder where an unwelcome visitor (the victim) had been fighting with her on her driveway and she stood over the victim, who was lying unarmed on the ground saying, "please, please, just let me go," and then took several steps back and shot the victim in the head. The evidence allowed the jury to conclude that the State had rebutted the castle doctrine defense's presumption of defendant's reasonable fear of imminent death or serious bodily harm, and it was also sufficient to allow the conclusion that defendant acted with premeditation and deliberation.

3. Homicide—jury instructions—castle doctrine—language mirroring the statute

The trial court's jury instructions on the castle doctrine in defendant's prosecution for first-degree murder were not erroneous where they accurately stated the law, including the rebuttable presumption that defendant had a reasonable fear of imminent death or serious bodily harm to herself or another, using language that mirrored the statute.

Appeal by defendant from judgment entered 24 May 2019 by Judge Lisa C. Bell in Caldwell County Superior Court. Heard in the Court of Appeals 14 April 2021.

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Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant.

DIETZ, Judge.

¶ 1 Defendant Nancy Austin appeals her conviction for first degree murder after she shot and killed Dylan Short in her driveway.

¶ 2 Just before the shooting, Short drove his car into Austin's driveway knowing that he was not welcome there and refused to leave. Short then shoved Austin's adult daughter, in view of Austin, and a fight broke out. After Austin pulled out a gun and demanded that Short leave her property, Short reached for the gun and, at some point, a gunshot went off. After further fighting, a bystander saw Austin standing over Short, who lay on the ground in the driveway pleading "Please, please, just let me go. Let me go." Austin then stepped several feet back and shot Short in the head, killing him.

¶ 3 The State charged Austin with murder, and Austin asserted the castle doctrine defense, which is codified in North Carolina General Statute § 14-51.2. The trial court declined to resolve the defense in a pre-trial hearing and also denied Austin's motion to dismiss at trial, concluding that there were fact issues to be resolved by a jury.

¶ 4 As explained below, the trial court properly declined to resolve the castle doctrine defense before trial. Where, as here, there are fact disputes concerning the castle doctrine's applicability, those fact questions must be resolved by a jury. The trial court also properly denied the motion to dismiss because the State presented sufficient evidence to rebut the castle doctrine's presumption in favor of the lawful occupant of a home, thus creating a fact issue concerning the doctrine's applicability. Finally, the trial court's jury instructions, viewed as a whole, properly instructed the jury on the elements of the castle doctrine. We therefore reject Austin's arguments and find no error in the trial court's judgment.

Facts and Procedural History

¶ 5 In 2013, Defendant Nancy Austin lived in a home with her daughter, Sarah, and Sarah's child. Dylan Short is the father of Sarah's child. Short was once in a relationship with Sarah, but the two later broke up.

¶ 6 After a violent incident between Short and Sarah at Austin's home in the summer of 2012, Austin told Short he was not welcome on the

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property. Sarah resumed a relationship with Short in November 2013. In December 2013, Austin and Short exchanged Facebook messages in which Austin disapproved of Short's relationship with her daughter. Austin also accused Short of attempting to run her off the road, which he acknowledged.

¶ 7 On 26 December 2013, Short spent the day with Sarah and then followed her home without her permission. Short had not been to the house in over a year. Austin was outside in the driveway, near a "no trespassing" sign, when Short arrived. Sarah, who had already arrived, got out of her car and took her child inside.

¶ 8 Short yelled at Sarah to stop and to talk to him. Austin told Short to leave. Sarah also told Short to leave, and Short then pushed her. Short was unarmed at the time. At this point, Austin took out a gun, pointed it at Short, told her daughter to go inside, and told Short to leave. Short refused to leave, telling Austin he did not have to leave because his child was inside the home.

¶ 9 Austin testified that she looked to see if her daughter had gone inside and, when she turned back, Short had "jumped" on her and reached for the gun. As Sarah was walking inside, she heard a gunshot. When she turned back around, Short and Austin were entangled, and Short was reaching around Austin's back toward the gun. Sarah ran toward them and pushed Short. Sarah fell to the ground with Short, struggled with him, then moved on top of him and put her hands around his neck. Sarah got up again to go back into the house and, as she walked away, heard a second gunshot. She turned around and saw that Austin, who was standing up at this time, had shot Short, who was on the ground. Austin told Sarah to call 911, which she did.

¶ 10 In statements to police officers that evening, Austin explained that she had previously told Short not to come on her property, that when he arrived, she told him to leave, and that Short refused to leave. She also told the officers about the struggle in the driveway and that Short had knocked her to the ground and grabbed for her gun. Lastly, she told the officers that Short was on the ground and within three feet of her when she shot him.

¶ 11 The State charged Austin with the first degree murder of Short. The case went to trial. At trial, Billy Herald, who was working on a nearby property about twenty-five to forty yards away from Austin's home, testified that he had witnessed some of the incident. Herald testified that he saw Sarah drive into Austin's driveway at a fairly high speed and then saw Short pull up behind her, yelling at her to stop. Herald stopped watch-

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ing until he heard Short shout, “she’s got a loaded gun,” a few minutes later. He looked back and saw Short on his left knee with his hand up, and Austin pointing a gun at him. He stopped watching again and then, shortly after, he heard a gunshot. He looked back and saw Short behind Austin and Austin’s daughter jumping on top of Short, then Short falling to the ground. Herald testified that he then saw Austin stand over Short, take two steps back, and then shoot Short at a distance of five to six feet away. Before Austin shot Short, Herald heard him say, “Please, please, just let me go. Let me go.”

¶ 12 Dr. Patrick Lantz, who performed the autopsy, testified that Short died from a single gunshot wound to the face. Lantz stated that he observed stippling on Short’s face, indicating that the shooting occurred at an intermediate range. Finally, Lantz testified that he would not expect stippling of this nature in a shooting with a range farther than three feet, but that it would depend on the ammunition used.

¶ 13 On 24 May 2019, the jury found Austin guilty of first degree murder and the court sentenced her to life without parole. Austin gave notice of appeal in open court.

Analysis

¶ 14 Every issue Austin asserts on appeal concerns some aspect of a self-defense provision in our General Statutes commonly called the “castle doctrine.” *See* N.C. Gen. Stat. § 14-51.2.

¶ 15 “The ‘castle doctrine’ is derived from the principle that one’s home is one’s castle and is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world.” *State v. Cook*, 254 N.C. App. 150, 157, 802 S.E.2d 575, 579 (2017) (Stroud, J. dissenting). The castle doctrine is a form of self-defense, but it is broader than the traditional self-defense doctrine because, when the statutory criteria are satisfied, the defendant no longer has the burden to prove key elements of the traditional self-defense doctrine. N.C. Gen. Stat. § 14-51.2(b). With this overview in mind, we turn to Austin’s specific arguments on appeal.

I. Pre-trial determination of castle doctrine defense

¶ 16 [1] Austin first argues that the trial court erred by refusing to adjudicate her castle doctrine defense in a pre-trial hearing. Austin contends that, when a criminal defendant asserts the castle doctrine defense and moves to dismiss, the defendant has “the right to have a judge, rather than a jury, evaluate the evidence to determine whether she was immune under the statute.”

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¶ 17 Austin’s argument turns on the specific language in the operative portion of the castle doctrine statute, which provides that a person satisfying the castle doctrine criteria “is immune from civil or criminal liability.” N.C. Gen. Stat. § 14-51.2(e). Austin argues that the use of the word “immunity” means that this is a question that must be resolved by the judge, not the jury.

¶ 18 The flaw in this argument is that the word “immunity” has different legal meanings depending on the context and, here, the context indicates that this is not a traditional immunity from prosecution that must be resolved by the court before trial. A traditional immunity is “not merely an affirmative defense to claims; it is a complete immunity from being sued in court.” *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018). In other words, it creates not merely an assurance that no judgment can be entered against the person, but a right not to be forced into court to defend oneself. *Id.*

¶ 19 In the criminal context, the General Assembly signals a grant of this type of immunity by referring to it as “immunity from prosecution.” So, for example, the statute requiring trial courts to resolve an immunity issue pre-trial applies when the defendant “has been granted immunity by law from prosecution.” N.C. Gen. Stat. § 15A-954(a)(9). This type of immunity often arises when the government seeks to compel a person to testify who might otherwise assert the right against self-incrimination. *See generally* N.C. Gen. Stat. § 15A-1051 *et seq.*

¶ 20 Our General Statutes use the phrase “immunity from prosecution” repeatedly when describing this type of immunity in the criminal context. *See, e.g.*, N.C. Gen. Stat. § 14-205.1 (granting “immunity from prosecution” to minors involved in soliciting prostitution); N.C. Gen. Stat. § 75-11 (granting “full immunity from criminal prosecution and criminal punishment” to persons compelled to testify against a corporation in certain consumer cases); N.C. Gen. Stat. § 90-96.2 (granting “limited immunity from prosecution” in the context of reporting drug overdoses); N.C. Gen. Stat. § 90-113.27 (granting “immunity from prosecution” to certain participants in needle exchange programs).

¶ 21 Here, by contrast, the castle doctrine provides immunity from “criminal liability.” In this context, the immunity is from a conviction and judgment, not the prosecution itself. This conclusion is further supported by the distinction between traditional immunities from prosecution, which typically involve little or no fact determination, and the castle doctrine defense, which, as explained below, can involve deeply fact-intensive questions. Accordingly, we reject Austin’s argument that the castle doctrine statute granted her “the right to have a judge, rather than a jury,

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evaluate the evidence to determine whether she was immune under the statute.” Where, as here, the trial court determined that there were fact questions concerning the applicability of the castle doctrine defense, the trial court properly permitted the case to proceed to trial so that a jury can resolve those disputed facts.

II. Motion to dismiss

¶ 22 **[2]** Austin next argues that the trial court erred by denying her motion to dismiss for insufficiency of the evidence, based on the castle doctrine and a lack of premeditation and deliberation.

¶ 23 “This Court reviews the trial court’s denial of a motion to dismiss de novo.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). When a criminal defendant moves to dismiss, “the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant’s being the perpetrator of the offense.” *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 24 The castle doctrine functions by creating a presumption of reasonable fear of imminent death or serious bodily harm in favor of a lawful occupant of a home, which in turn justifies the occupant’s use of deadly force. N.C. Gen. Stat. § 14-51.2. Specifically, the statute provides that the “lawful occupant of a home” is “presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself when using defensive force that is intended or likely to cause death or serious bodily harm to another” if both of the following apply: (1) “The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home,” and (2) the person using “defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.” N.C. Gen. Stat. § 14-51.2(b)(1)–(2). The statute’s definition of “home” includes the home’s curtilage, such as the driveway at issue in this case. N.C. Gen. Stat. § 14-51.2(a)(1).

¶ 25 In effect, this provision eliminates the needs for lawful occupants of a home to show that they reasonably believed the use of deadly force

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was necessary to prevent imminent death or serious bodily injury to themselves or others—a requirement of traditional self-defense. Instead, that belief is presumed when the statutory criteria are satisfied.

¶ 26

But, importantly, the statute has a separate section providing that this presumption “shall be rebuttable” and “does not apply” in certain circumstances set out in the statute:

The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

(1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.

(2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.

(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.

(4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or

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workplace and (ii) has exited the home, motor vehicle, or workplace.

N.C. Gen. Stat. § 14-51.2(c).

¶ 27 One fair reading of this provision is that the presumption is rebuttable *only* in the five enumerated circumstances listed in the statute. That is, the statute announces that the presumption can be overcome and then provides the only five specific factual scenarios in which that is so.

¶ 28 But this Court and our Supreme Court rejected that interpretation several years ago. In *State v. Cook*, law enforcement officers kicked the door to the defendant's bedroom while executing a search warrant and the defendant fired two shots at the door, narrowly missing one of the officers. The defendant asserted that he did not hear the officers announce their presence, that he thought an intruder was breaking into his house, that he was scared for his life, and that "he did not take aim at or otherwise have any specific intent to shoot the 'intruder' when he fired the shots." 254 N.C. App. 150, 152, 802 S.E.2d 575, 577 (2017), *aff'd*, 370 N.C. 506, 809 S.E.2d 566 (2018).

¶ 29 The dissenting judge in the Court of Appeals argued that the defendant was entitled to a castle doctrine instruction and the trial court erred by refusing to provide that instruction. *Id.* at 160, 802 S.E.2d at 581. The majority rejected that assertion, holding that "a defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C. Gen. Stat. § 14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm." *Id.* at 156, 802 S.E.2d at 578. The Supreme Court affirmed the Court of Appeals in a *per curiam* decision. *State v. Cook*, 370 N.C. 506, 809 S.E.2d 566 (2018).

¶ 30 We are bound by *Cook* to hold that the castle doctrine's rebuttable presumption is not limited to the five scenarios listed in the statute. Instead, as explained in *Cook*, if the State presents substantial evidence from which a reasonable juror could conclude that a defendant did not have a reasonable fear of imminent death or serious bodily harm, the State can overcome the presumption and create a fact question for the jury. Thus, the castle doctrine, as interpreted in *Cook*, is effectively a burden-shifting provision, creating a presumption in favor of the defendant that can then be rebutted by the State.

¶ 31 Here, the State presented evidence that a bystander saw Austin standing over Short, who was lying unarmed in Austin's driveway and pleading "Please, please, just let me go. Let me go." The bystander saw

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Austin take several steps back and then shoot Short in the head from three to six feet away. Taken in the light most favorable to the State, this is sufficient evidence from which the jury could determine that the State had rebutted the presumption and shown that Austin did not have a reasonable fear of imminent death or serious bodily harm when she shot Short in the head as he lay on the ground in her driveway.

¶ 32 Likewise, this evidence readily is sufficient to overcome a motion to dismiss based on lack of premeditation and deliberation. *See State v. Childress*, 367 N.C. 693, 695, 766 S.E.2d 328, 330 (2014). Accordingly, the trial court did not err by denying Austin’s motion to dismiss.

III. Jury instruction on Section 14-51.2

¶ 33 [3] Finally, Austin argues that the court erred in its jury instruction on the castle doctrine and that this error prejudiced her.

¶ 34 This Court reviews challenges to the trial court’s jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). We examine the instructions “as a whole” to determine if they present the law “fairly and clearly” to the jury. *State v. Chandler*, 342 N.C. 742, 751–52, 467 S.E.2d 636, 641 (1996). The purpose of a jury instruction “is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.” *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006). An error in jury instructions “is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.” *State v. Dilworth*, 274 N.C. App. 57, 61, 851 S.E.2d 406, 409 (2020).

¶ 35 Here, the court instructed the jury that “Nancy Austin was justified in using deadly force if . . . [she] reasonably believed that the degree of force she used was necessary to prevent an unlawful and forceful entry or to terminate Dylan Short’s unlawful and forcible entry into her home.” The court then instructed the jury on the castle doctrine using language that mirrors the statute:

Under North Carolina law, a lawful occupant of her home does not have a duty to retreat from an intruder under these circumstances. Furthermore, a person who unlawfully and by force enters or attempts to enter a person’s home is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

In addition, Nancy Austin is presumed to have held a reasonable fear of imminent death or serious bodily

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harm to herself or another when using defensive force that is intended or likely to cause death or serious bodily harm if both of the following apply:

One, Dylan Short was in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered Nancy Austin's home; and Nancy Austin knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred. The presumption of Nancy Austin's reasonable fear of imminent death or serious bodily harm may be rebutted if you find beyond a reasonable doubt that Dylan Short had discontinued all efforts to unlawfully and forcefully enter the home and that Dylan Short had exited the home.

¶ 36 Every portion of this instruction is an accurate statement of the law. Moreover, this language was crafted with significant input from the parties during the charge conference.

¶ 37 During the conference, the trial court informed the parties that the court believed the castle doctrine presumption could be rebutted by evidence beyond the five enumerated criteria in the statute but explained that the court had not prepared any specific instructions on what additional evidence could be considered to rebut the presumption:

One thing that was not discussed yesterday and has not been included in my draft [of the jury instructions] are the – we didn't discuss about the presumptions, the rebuttability of the presumption and what is required to rebut the presumption.

I did bring up my interpretation of the statute being those five enumerated exceptions aren't the only – I don't think the statute says those are the limited reasons – or the limited ways in which the presumption can be rebutted, because of the way the statute's worded. But we didn't get to a discussion of that yesterday, so that is one part of your proposed instruction that's not included in the draft but wasn't intentionally excluded.

¶ 38 The State then explained that it believed the fifth enumerated criteria in the statute, N.C. Gen. Stat. § 14-51.2(c)(5), applied and that it was reluctant to propose additional instructions fleshing out other possible

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evidence that could rebut the presumption, beyond the express statutory criteria, because “the risk that the State would run, Your Honor – and we talked about it, trying to figure out some nonstatutory. Because the State’s reading and interpretation of that is that these are not just the only ways that this could be rebutted, but there are others. But since we don’t have a lot of guidance with jury instructions – because they didn’t even address the way that it could be rebutted, in the jury instruction. So we didn’t want to go outside of what the law is providing in the statute, even though we do agree that there are additional ways that that could possibly be shown.”

¶ 39 Ultimately, the court chose not to include any additional instructions on how the castle doctrine presumption could be rebutted and simply instructed the jury that the castle doctrine created a presumption. The court also included a statement, consistent with the statute, that the presumption automatically is rebutted if the State proved “beyond a reasonable doubt that Dylan Short had discontinued all efforts to unlawfully and forcefully enter the home and that Dylan Short had exited the home.”

¶ 40 The crux of Austin’s argument is that the State should be barred on appeal from arguing that the jury could consider any basis to rebut the presumption other than the specific statutory criteria in N.C. Gen. Stat. § 14-51.2(c)(5) because the State “expressly disavowed any reliance on any non-statutory basis to rebut the presumption” during the charge conference. We are not persuaded that the State’s discussion with the trial court meant what Austin contends. But, in any event, the State, like any other party, cannot stipulate to what the law is. *State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603 (2006). “In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented.” *Smith*, 360 N.C. at 346, 626 S.E.2d at 261.

¶ 41 Importantly, the trial court did not instruct the jury that the statutory criteria in N.C. Gen. Stat. § 14-51.2(c)(5) was the only means of rebutting the presumption, which would not be an accurate statement of the law under *Cook*. Instead, the court instructed the jury, correctly, that Austin was “presumed to have held a reasonable fear of imminent death or serious bodily harm to herself or another.” The court also instructed the jury that, if it found beyond a reasonable doubt that the specific statutory criteria in Section 14-51.2(c)(5) was satisfied, the presumption was rebutted as a matter of law. The court chose not to provide additional instructions to the jury concerning the particular circumstances, beyond the statutory criteria, that could overcome the presumption of reasonable fear of imminent death or serious bodily harm, instead leaving the jury to make that determination from the facts presented in the case.

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¶ 42 When viewed as a whole, the trial court accurately instructed the jury on the castle doctrine defense and its rebuttable presumption using language that mirrored the statute. *Chandler*, 342 N.C. at 751–52, 467 S.E.2d at 641. We thus reject Austin’s arguments with respect to the presumption instruction.

¶ 43 Austin also argues that the trial court erred by treating the castle doctrine as “distinct from self-defense” because “there is a unitary justification defense for the use of defensive force.” But again, the trial court properly instructed the jury on the issue of self-defense and the castle doctrine separately, using language that mirrored that statute and the applicable law. Indeed, Austin’s trial counsel told the trial court that Austin had “no problem” with the castle doctrine and self-defense instructions being separated, stating that they “should be seen as separate” because there are “different elements.” We thus reject this argument as well.

¶ 44 Finally, Austin also asserts several other instructional arguments that were not preserved in the trial court. We review these issues for plain error. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005). “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error is “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.” *Id.* Here, because the trial court’s instructions as a whole properly instructed the jury on the law concerning self-defense and the statutory castle doctrine, we find no error with respect to these unpreserved instructional arguments and certainly no plain error.

Conclusion

¶ 45 We find no error in the trial court’s judgment.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

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STATE OF NORTH CAROLINA

v.

JAMES OPLETON BRADLEY, DEFENDANT

No. COA20-566

Filed 21 September 2021

1. Evidence—murder trial—evidence of another missing person—Evidence Rule 404(b)—cases intertwined

In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, there was no error in the admission of evidence regarding the second woman because the investigations into each woman's disappearance were temporally and factually interrelated, there were numerous similarities between both women, and nearly every trial witness had some connection to both investigations. The evidence was properly admitted under Rule 404(b) to provide a complete development of the facts and to establish the weight and probative value of the State's evidence.

2. Evidence—murder trial—evidence of another missing person—Evidence Rule 403—probative value

In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, the trial court did not abuse its discretion by determining that, pursuant to Rule 403, evidence regarding the second woman was more probative than prejudicial because there was an obvious connection between the disappearances of both women, the investigations were closely intertwined, and the evidence demonstrated a common plan or scheme by defendant in targeting both women.

3. Criminal Law—prosecutor's closing arguments—victim's blood the source of DNA in defendant's car—reasonable inference

In a first-degree murder trial, the prosecutor's statements that DNA found in defendant's car came from the victim's blood were based on reasonable inferences from the evidence regarding blood and DNA that were recovered from the car, even if the evidence contained some discrepancies, which may have resulted from the use of chemical cleaners inside the car.

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4. Criminal Law—prosecutor’s closing statements—about second missing woman being dead—reasonable inference—proper purpose

In a trial for the first-degree murder of a woman, the prosecutor was properly allowed to state during closing that a second woman—whose disappearance led to an investigation that was closely intertwined with the victim’s—was dead. A pretrial ruling that limited how the State could refer to the status of the second missing woman, whose body had not been found, was intended to prohibit any mention that defendant had been convicted of the second woman’s death. Not only did evidence support a reasonable inference that the second missing woman was dead, but also the references to her at closing were for a proper purpose, including defendant’s identity as the victim’s killer, motive, and a common plan or scheme, which the trial court reinforced through a limiting instruction to the jury.

5. Criminal Law—prosecutor’s closing statements—shifting burden to defendant—curative instruction

In a first-degree murder trial, defendant was not entitled to a mistrial after the prosecutor made statements during closing suggesting that defendant had the burden of proving his own innocence and that defendant was responsible for the inclusion of second-degree murder as a lesser-included offense on the verdict sheet. The trial court gave a curative instruction to the jury based on defendant’s timely objection, and juries are presumed to follow a court’s instructions.

6. Criminal Law—prosecutor’s closing statements—presence of “evil”—race of defendant and victims visible on visual aid

In a first-degree murder trial, the prosecutor’s statements during closing regarding the presence of “evil” were not so grossly improper as to require *ex mero motu* intervention by the trial court. Although defendant argued on appeal that the statements were particularly improper for occurring while the prosecutor displayed a posterboard to the jury with pictures of defendant, who is Black, and the victim and two other women who were involved with defendant, all of whom are white, the prosecutor made no references to race during closing, defendant had an opportunity to review the posterboard beforehand and had no objection to it being shown, and the jury had already observed the race of each person on the posterboard through evidence that was presented during trial.

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7. Homicide—first-degree—premeditation and deliberation—sufficiency of evidence

In a first-degree murder trial, the State's evidence, though circumstantial, was sufficient to support a reasonable inference that defendant acted with premeditation and deliberation in killing the victim, given the brutal nature of the killing and the efforts undertaken to conceal the body and the crime. The victim died from four lacerations to her skull and internal epidural hemorrhaging from repeated blunt force trauma; she had numerous other wounds inflicted from either strangling or blunt force trauma; her body was found stripped, bound with duct tape, wrapped in black trash bags, and buried in a shallow grave; and chemical cleaners had been used to wash the inside of defendant's car.

Appeal by Defendant from judgment entered 4 April 2019 by Judge Douglas B. Sasser in New Hanover County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Elisha Tucker ("Ms. Tucker"), a resident of New Hanover County and girlfriend of Defendant James Opleton Bradley ("Defendant"), was reported missing by her mother in October 2013. Six months later, after law enforcement investigation of Ms. Tucker's case had gone cold, Shannon Rippy Van Newkirk ("Ms. Rippy"), Defendant's co-worker and another of his romantic interests, disappeared from her home in Wilmington. Defendant made numerous false statements about his possible involvement in Ms. Rippy's disappearance, leading police to search Defendant's jobsite for her body. There, police found a woman's nude corpse, bound in the fetal position by duct tape and wrapped in three trash bags, in a shallow grave beneath a tree stump. An autopsy later revealed the body belonged to Ms. Tucker. Ms. Rippy has never been found.¹

1. Defendant was tried and convicted for the murder of Ms. Rippy in 2017, and this Court affirmed his conviction in 2018. *State v. Bradley*, 262 N.C. App. 373, 820 S.E.2d 129, 2018 WL 5796233 (2018) (unpublished), *petition for disc. rev. denied*, 372 N.C. 61, 822 S.E.2d 630 (2019).

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¶ 2 Defendant appeals from a judgment entered following a jury verdict finding him guilty of first-degree murder in the death of Ms. Tucker. Defendant asserts prejudicial error in: (1) the admission of evidence concerning Ms. Rippy's disappearance; (2) allegedly improper closing arguments by the State; and (3) the denial of his motion to dismiss the first-degree murder charge for insufficient evidence of premeditation and deliberation. After careful review, we hold Defendant has failed to demonstrate prejudicial error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 The record below tends to show the following:

1. Ms. Tucker's Disappearance

¶ 4 On 21 October 2013, Rose Waldron ("Ms. Waldron") reported her 34-year-old daughter, Ms. Tucker, missing. Ms. Waldron had filed several missing persons reports previously, as her daughter lived a troubled life that included a heroin addiction, prostitution, homelessness, and a series of abusive relationships.

¶ 5 Wilmington Police Detective Carlos Lamberty ("Det. Lamberty") was named the lead investigator on Ms. Tucker's missing person case. Det. Lamberty patrolled several areas in Wilmington where Ms. Tucker was known to frequent, checked hotels and motels where she had previously stayed, released a department-wide call for information, and solicited tips through local media. All of these efforts failed to lead to the discovery of Ms. Tucker's whereabouts.

2. The Rippy Disappearance and Investigation

¶ 6 On 6 April 2014, Roberta Lewis ("Ms. Lewis") went to visit her daughter, Ms. Rippy, for her 54th birthday at her apartment in Wilmington. When Ms. Rippy did not come to the door, Ms. Lewis left and attempted to contact her daughter by phone over the next several hours. Ms. Lewis still had not heard from her daughter by the following morning, leading her to contact the Wilmington Police Department.

¶ 7 An officer forcibly entered the apartment in an effort to locate Ms. Rippy, but she was not inside. Nothing was missing from the apartment other than Ms. Rippy's purse. Her moped—her only source of transportation due to a revoked driver's license following several DWIs—was still parked outside. A written missing person report was filed shortly thereafter, and the matter was assigned to Det. Lamberty.

¶ 8 Wilmington police began their investigation into Ms. Rippy's disappearance by obtaining her cellular phone records, which revealed several

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calls to Defendant on the night before her disappearance. Given these call records, and in light of the fact that Defendant and Ms. Rippy were co-workers at a company called Mott Landscaping, police decided to try and locate Defendant at his home for an interview. Officers conducted their first interview with Defendant on 9 April 2014. He expressed surprise at her disappearance but told police she was severely depressed and had recently expressed suicidal ideations to him. He also told police at a follow-up interview two days later that he had last seen Ms. Rippy on 3 April 2014.

¶ 9 Det. Lamberty, along with fellow Detective Kevin Tully (“Det. Tully”), were able to discern from Ms. Rippy’s cellular location data that she had travelled south from a bar in downtown Wilmington on 5 April 2014, the night before her disappearance. Dets. Lamberty and Tully reviewed traffic camera images from that evening and found footage of a truck matching the description of Defendant’s vehicle travelling southbound consistent with the cellular location data from Ms. Rippy’s phone. Dets. Lamberty and Tully also located surveillance footage from a gas station for the night in question, which showed Defendant buying items inside the station while Ms. Rippy was seated inside his truck.

¶ 10 Having caught Defendant in a lie about his last contact with Ms. Rippy, police obtained and executed a search warrant on Defendant’s home and truck. They also interviewed Defendant again. Defendant acknowledged that he had been lying and explained that he had actually given her a ride to a nearby business on the night before Ms. Rippy’s disappearance. This statement, too, proved to be untrue, as neither Defendant, his truck, nor Ms. Rippy appeared on the surveillance footage obtained from the business identified by Defendant. Police continued to press Defendant on these inconsistencies, eventually leading him to say that he had last seen Ms. Rippy on 5 April 2014 when she jumped out of his vehicle near Greenfield Lake while on the phone with Steven Mott (“Mr. Mott”), the owner of Mott Landscaping. In a later statement, Defendant told police that he knew he was under suspicion “because of other reasons in his past^[2] and that . . . he was the last person to see her alive.”

¶ 11 Defendant also told detectives that he had taken at least one woman to a vacant lot owned by Mott Landscaping to engage in sexual activity. Police spent several weeks searching properties owned by and associated with Mott Landscaping for Ms. Rippy without success. Searches of

2. Defendant was convicted for the first-degree murder of his 11-year-old stepdaughter in 1990. See *Bradley*, 2018 WL 5796233 at *2-3 (discussing the facts of Defendant’s conviction for the murder of his stepdaughter).

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the wooded areas around Defendant's home and Greenfield Lake were likewise unsuccessful.

3. The Recovery of Ms. Tucker's Body

¶ 12 Law enforcement continued to comb areas connected to Mott Landscaping and Defendant for Ms. Rippy's body over the ensuing weeks. On 29 April 2014, Wilmington police searched a farm owned by Mr. Mott in Pender County that Defendant was responsible for mowing and clearing. In the course of that search, officers found a naked body inside three black trash bags buried in a shallow grave. The body was found in the fetal position, its legs bound with duct tape. The State Crime Lab's analysis of the duct tape found on the body would later show it to be consistent with duct tape recovered from Defendant's apartment. Bleach and black trash bags were found in a nearby workshop. Though Det. Lamberty originally believed the body to be Ms. Rippy, an autopsy later revealed it to be Ms. Tucker.

4. Investigation Into Ms. Tucker's Murder

¶ 13 Already arrested for Ms. Rippy's disappearance, Defendant became a suspect in the Tucker investigation, resulting in additional searches of his home and effects for evidence pertinent to that case. Det. Lamberty requested a second search warrant for Defendant's truck and removed the driver's side floormat, carpet, and padding for DNA analysis. Several screening tests for blood returned positive results for portions of the floor padding and carpeting, and additional testing conclusively established the presence of human blood on those items. Samples from the padding and carpeting were also subjected to DNA analysis. Although the portions of the padding and floormat which conclusively tested positive for human blood failed to produce usable DNA samples, a section of the padding that tested inconclusively for blood tested uniquely positive for Ms. Tucker's DNA.

¶ 14 Police also discovered that a man named Peter Koke ("Mr. Koke"), who had previous dealings with Mr. Mott, Ms. Rippy, and Defendant, was propositioned by Ms. Tucker in July of 2013. When Mr. Koke declined her services, Ms. Tucker entered into a vehicle with Defendant. Mr. Koke had seen Ms. Tucker and Defendant together at other times and, on one occasion, witnessed a shouting match occur between Defendant and Ms. Rippy.

¶ 15 A detective with the Wilmington Police Department also met with a woman named Crystal Sitosky ("Ms. Sitosky") about Defendant's involve-

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ment with Ms. Rippy and Tucker. Ms. Sitosky, who struggled with an opioid addiction, first met Defendant in July of 2012 when he began flirting with her outside her probation office. Ms. Sitosky saw Ms. Tucker in Defendant's car during this conversation, which ended when she and Defendant exchanged numbers. Ms. Sitosky later saw Defendant again when she called him after her car was immobilized with a flat tire. She continued to see Defendant periodically because he provided her with money for drugs. Defendant repeatedly expressed a desire to form a romantic relationship with Ms. Sitosky, but she rebuffed his advances each time. She also met with Defendant at both the Mott Landscaping lot where he had engaged with sexual activity with other women and the tract in Pender County where Ms. Tucker's body was found. Defendant gave Ms. Sitosky a phone at one point, which contained photographs of Ms. Tucker and her children. He also hinted to Ms. Sitosky that he was romantically interested in Ms. Rippy, but that they were not in a relationship.

5. The Trial

¶ 16 Defendant was indicted for the first-degree murder of Ms. Tucker on 5 December 2016 and was tried beginning 22 January 2019. Prior to trial, the State moved to admit 404(b) evidence of the investigation into Ms. Rippy's disappearance, as well as copies of stories Defendant had written about murderers titled "The Beast Within" and "Serial Killer." Following a *voir dire* hearing, the trial court entered a written order concluding that the circumstances of Ms. Rippy's disappearance were sufficiently similar and proximate to Ms. Tucker's death to be admissible under Rule 404(b) to show: (1) how police came to discover Ms. Tucker's body; (2) identity; (3) motive; and (4) plan, preparation, and *modus operandi* of Defendant. The trial court also ruled the probative value of that evidence was not outweighed by the danger of unfair prejudice, and that a limiting instruction would be given to the jury. The trial court further ruled that Defendant's short stories were more prejudicial than probative and therefore inadmissible under Rule 403.

¶ 17 At trial, 23 witnesses testified consistent with the above recitation of the facts. The State elicited additional testimony that police recovered a "Rug Doctor" carpet cleaner from Defendant's apartment, that Defendant had washed his truck several times since the disappearances of Ms. Tucker and Rippy, and that the inability to recover DNA from the conclusive human blood samples on the truck carpeting and padding may have been caused by the use of chemical cleaners. Defendant moved to dismiss the first-degree murder charge at the close of evidence. The trial court denied Defendant's motion.

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6. Closing Arguments

¶ 18 Following the presentation of evidence, the prosecutor began his closing argument by opining about notions of good and evil, telling the jury that the love between parents and children is good, but “just as there is good and beauty in the world, there’s also evil. And you don’t need a law degree to know what [the killing of Ms. Tucker] is. This, ladies and gentlemen, is pure evil.” He then asserted that while there were some differences between Ms. Rippy and Tucker, they both shared a common connection to Defendant. Defendant’s counsel objected, arguing that the evidence of Ms. Rippy’s disappearance was introduced for limited purposes, and that this argument was outside the scope of the trial court’s prior ruling. The trial court overruled the objection, and the prosecutor continued, emphasizing that the limited purposes for which evidence around Ms. Rippy’s disappearance was introduced was to show “the identity of the killer. It goes to motive, is there a plan, is there a *modus operandi*.”

¶ 19 Later in closing, the prosecutor stated that “[y]ou know, sometimes evil wears a mask. Sometimes you have to dip below the surface. Sometimes evil is readily apparent, like when you’re looking at the grotesque deformities on the body of [Ms. Waldron]’s baby [Ms. Tucker]. But, no, when you’re looking at this defendant, you have to dip below the surface.” At another point, the prosecutor asked the jury, “[i]s [Ms. Rippy] in the belly of an alligator in Greenfield Lake? . . . Is she in the belly of that pig out on Hoover Road? Is she in a hole somewhere? . . . How does it end? Her life is over. We just haven’t found the body for a funeral yet.” Defendant objected and moved to strike on the ground that any suggestion Ms. Rippy was dead was outside the scope of the earlier Rule 404(b) ruling by the trial court. Following a hearing outside the presence of the jury, the trial court overruled Defendant’s objection and allowed the prosecutor to continue. The prosecutor resumed argument by saying “Shannon Rippy is gone too, but she’s not forgotten. She’s dead, but we’ll never stop looking.” Defendant objected again and was overruled.

¶ 20 The prosecutor’s closing also referenced the DNA evidence tested by the State Crime Lab, contending that Ms. Tucker’s blood was found in Defendant’s truck. Defendant objected and moved to strike the argument but was overruled. Later, the prosecutor offered that “there’s actually only five ways to defend any case,” and began explaining why no defense could disprove Defendant’s guilt. Defendant objected, moved for a mistrial, and moved to strike. The trial court sustained that objection and allowed the motion to strike, though it ultimately denied the motion for mistrial. It then gave a curative instruction that the Defendant is pre-

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sumed innocent, the prosecutor's argument must be disregarded, and that Defendant has no burden in a criminal prosecution. The prosecutor resumed his argument by reiterating that "the only burden of proof in this case is on [the State]. . . . There's no burden on the defense attorneys, to be clear."

¶ 21 Finally, in a later segment of closing argument, the prosecutor argued to the jury that Defendant could not contend both that he was innocent or at most guilty of second-degree murder, as each position contradicted the other. Defendant objected and moved for a mistrial on the basis that the prosecutor's argument suggested Defendant was responsible for the lesser-included second-degree murder charge on the verdict sheet. The trial court reviewed the transcript of arguments, concluded that the State had not made such a suggestion, and denied the motion for mistrial. It did, however, sustain Defendant's objection and give a curative instruction that the verdict sheet was prepared by the court and not the parties.

7. Conviction and Appeal

¶ 22 After two-and-a-half hours of deliberations, the jury found Defendant guilty of first-degree murder. The trial then proceeded to the sentencing phase, and the prosecutor urged the jury to impose the death penalty based on Defendant's two prior first-degree murder convictions and the heinous, atrocious, or cruel nature of Ms. Tucker's murder. The jury was unable to reach a unanimous recommendation. The trial court then imposed a sentence of life without parole. Defendant gave notice of appeal in open court.

II. ANALYSIS

¶ 23 Defendant asserts the trial court prejudicially erred in: (1) admitting substantial evidence of the investigation into Ms. Rippy's disappearance under Rules 404(b) and 403 of the North Carolina Rules of Evidence; (2) failing to properly address allegedly improper closing arguments by the State; and (3) denying his motion to dismiss the first-degree murder charge for insufficient evidence of premeditation and deliberation. Defendant further asserts that all of the foregoing errors, if insufficiently prejudicial standing alone, were so cumulatively prejudicial as to warrant a new trial. We address each argument in turn.

1. Evidence of Ms. Rippy's Disappearance Under Rules 404(b) and 403

¶ 24 Defendant first contends that the evidence of Ms. Rippy's disappearance was: (1) not sufficiently similar to be admitted under Rule 404(b);

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and (2) was so voluminous as to be more prejudicial than probative under Rule 403. Defendant requests plain error review in the event trial counsel failed to timely object to the challenged evidence.

a. Preservation

¶ 25 Our appellate rules provide that, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion” N.C. R. App. P. 10(a)(1) (2021). Our Supreme Court has held that “[t]o be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial.” *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citation and quotation marks omitted). It is therefore insufficient to rely on objections lodged pre-trial or outside the presence of the jury. *Id.* Nor is it adequate to lodge an objection after similar evidence has previously been admitted without protest, as “the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.” *State v. Hudson*, 331 N.C. 122, 151, 415 S.E.2d 732, 747–48 (1992) (citation and quotation marks omitted).

¶ 26 Here, Defendant conceded prior to trial that some evidence of Ms. Rippy’s disappearance was admissible under Rule 404(b) to show how police came to discover Ms. Tucker’s body. Several witnesses testified at trial about Ms. Rippy without any objection by Defendant under Rules 404(b) and 403. Defendant first objected based on Rule 404(b) during Det. Lamberty’s testimony—well after other witnesses, including Ms. Rippy’s mother and other police officers, had testified on the same subjects and to substantially identical facts. Because Defendant did not lodge a timely objection to the evidence of Ms. Rippy’s disappearance that he now challenges on appeal, he has failed to preserve his Rule 404(b) and 403 arguments for prejudicial error review. *Ray*, 264 N.C. at 277, 697 S.E.2d at 322; *Hudson*, 331 N.C. at 151, 415 S.E.2d at 747–48.

¶ 27 Though Defendant failed to preserve his evidentiary arguments, his principal brief seeks plain error review of these issues. We review this portion of his appeal under that standard. *See* N.C. R. App. P. 10(a)(4) (2021) (“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.”).³

3. In its brief, the State suggests that plain error review is entirely unavailable because “Defendant fails to show exceptional circumstances warranting plain error review.” This statement inverts our application of the plain error standard; we will conduct plain error review when “specifically and distinctly contended” in a defendant’s principal brief,

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b. Plain Error Review

¶ 28 In order to demonstrate plain error, a defendant must “show that error occurred and the error ‘had a probable impact on the jury’s finding of guilty.’ ” *State v. Doisey*, 138 N.C. App. 620, 625, 532 S.E.2d 240, 244 (2000) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)). The error cannot be merely “obvious or apparent,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, and instead must be a “*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *Id.* (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

c. Standards of Review for 404(b) and 403 Error

¶ 29 We apply two different standards of review to discern whether the trial court erred under Rules 404(b) and 403. As explained by our Supreme Court:

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court’s Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

d. The Trial Court Did Not Err Under 404(b)

¶ 30 **[1]** Rule 404(b) is a “rule of *inclusion* of relevant evidence or other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990) (emphasis in original).

¶ 31 The rule itself expressly identifies several purposes for which evidence may be admitted, including to show “motive, opportunity, intent,

N.C. R. App. P. 10(a)(4), but we will only hold plain error exists following that review upon a showing by the defendant that his is an “exceptional case.” *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (citation and quotation marks omitted). *Cf. State v. Patterson*, 269 N.C. App. 640, 645, 839 S.E.2d 68, 72 (2020) (dismissing a defendant’s appeal under plain error review when he failed to argue “why the alleged error rises to plain error” and thus precluded “any meaningful review for plain error”).

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preparation, plan, . . . [or] identity.” N.C. R. Evid. 404(b). Because this list “is not exclusive,” *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852 (1995), evidence is admissible under the Rule to show, among other things, “the chain of circumstances or context of the charged crime . . . if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury.” *Id.* at 284, 457 S.E.2d at 853.

¶ 32 Evidence offered for a proper purpose under Rule 404(b) must adhere to “the requirements of similarity and temporal proximity.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). The crime charged and the evidence in question need not “rise to the level of the unique and bizarre,” *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988), though there must be “some unusual facts present in both crimes that would indicate that the same person committed them.” *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation and quotation marks omitted). In discerning whether the 404(b) evidence was properly admitted, we examine the similarities identified by the trial court rather than the differences between the crime charged and the proffered evidence. *State v. Wilson-Angeles*, 251 N.C. App. 886, 893, 795 S.E.2d 657, 664 (2017) (citations omitted).

¶ 33 The trial court entered a written order with findings of fact and conclusions of law in support of its decision to admit evidence of Ms. Rippy’s disappearance under Rule 404(b). The trial court’s findings of fact—none challenged on appeal—include the following:

16. . . . [B]oth Rippy and Tucker struggled with substance abuse issues.

17. . . . [B]oth Rippy and Tucker had limited financial resources.

18. . . . [B]oth Rippy and Tucker sometimes relied on the Defendant for transportation.

19. . . . [B]oth Rippy and Tucker had criminal convictions connected to their substance abuse issues.

20. . . . Defendant was romantically interested in both Rippy and Tucker and worked to gain their trust and confidence through sustained relationships.

¶ 34 The trial court made additional findings demonstrating how the Rippy and Tucker investigations were temporally and factually interrelated: (1) the disappearances occurred nine months apart at most; (2)

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police searched the Mott property where Ms. Tucker's body was found because Defendant and Ms. Rippy both worked for Mott Landscaping and Defendant was a suspect in Ms. Rippy's disappearance; (3) police initially believed the body found on the Mott property was Ms. Rippy; (4) Defendant was arrested for Ms. Rippy's murder on the day Ms. Tucker's body was found; and (5) Defendant told police that he had cleaned his car several times after Ms. Rippy had disappeared, and "the forensic evidence that placed Tucker's DNA inside the Defendant's Tahoe was barely visible and appears to have been degraded by some sort of chemical substance which would be consistent with efforts by the Defendant to clean the vehicle."

¶ 35 The trial court concluded based on its findings that evidence of Ms. Rippy's disappearance and the ensuing investigation was "essential [to] help provide a complete story to the jury," and also admissible to prove Defendant's identity, motive, intent, premeditation, deliberation, plan, preparation, and modus operandi. The trial court further concluded that the disappearances were "temporally proximate," and their circumstances were "similar in nature."

¶ 36 We hold that the trial court did not err in admitting the challenged evidence.

¶ 37 Defendant does not argue that the evidence was admitted for improper purposes; instead, he asserts that "the only information necessary to complete the story [of Ms. Tucker's death] was testimony about why detectives were on the property where Tucker's body was found," and the "superficial similarities" between Ms. Rippy and Tucker were inadequate to satisfy the Rule's similarity requirements.

¶ 38 Contrary to Defendant's contention, it was not possible to provide a natural and complete development of the facts without testimony concerning Ms. Rippy's disappearance and the police investigation that followed, leading to the discovery of Ms. Tucker's body. The disappearances and investigations are "inextricably intertwined," *White*, 340 N.C. at 286, 457 S.E.2d at 853.⁴

4. We note that practically every witness had some connection to both investigations. The detectives who testified, including Det. Lamberty, handled both cases. Ms. Sitosky came forward to report her knowledge of the relationship between Defendant and Ms. Tucker because she saw a letter from Ms. Rippy's mother about her missing daughter in the local newspaper. Mr. Mott, originally a person of interest in the Rippy investigation, owned the property where Ms. Tucker's body was found but was also Ms. Rippy's employer and on-and-off-again boyfriend. Mr. Koke, who was propositioned by Ms. Tucker and saw her with Defendant, had prior dealings with Defendant and Ms. Rippy.

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¶ 39 Simply telling the jury that detectives were searching for a missing person at the Mott property would not offer an adequate picture of Defendant's connection to that missing person. The evidence was necessary to establish the weight and probative value of the State's other evidence. For example, Mr. Mott—who was initially a suspect in Ms. Rippy's disappearance and who testified that Defendant was solely responsible for maintaining the tract of land where Ms. Tucker's body was found—told the jury that he never met Ms. Tucker and knew nothing about her murder. If jurors heard nothing about Ms. Rippy and Defendant's apparent involvement in her disappearance, they would rightly wonder whether Mr. Mott's testimony was truthful given: (1) Ms. Tucker's dismembered body was found on his land; and (2) his property was already being searched for a different missing woman. *Cf. State v. Washington*, 277 N.C. App. 576, 582, 2021-NCCOA-219, ¶ 21 (holding 404(b) evidence of a prior theft of a handgun used to commit a murder was admissible in the murder trial in part because it "explained why the legal gun owner was not considered a suspect and showed the thoroughness of law enforcement's investigation").

¶ 40 The investigation of Ms. Rippy's disappearance likewise bears upon Ms. Sitosky's credibility. She testified that she had seen Defendant and Ms. Tucker together on numerous occasions but only reported this information to police because she "had read in the newspaper about [Defendant] being arrested, [and] [Ms. Rippy]'s mom had wr[itten] a letter to the newspaper in response to, you know, her daughter missing, and it touched my heart. . . . I almost felt like I had to say something or do something. . . . I wanted to be helpful." Defendant's suspected involvement in the disappearance of Ms. Rippy demonstrated why Ms. Sitosky came forward to police. *See White*, 340 N.C. at 285–86, 457 S.E.2d at 853 (holding evidence was admissible under Rule 404(b) to show context in an intertwined case because it was necessary "to assess [the witness's] credibility or what weight to give his testimony").

¶ 41 The evidence uncovered in the investigation of Ms. Rippy's disappearance also cast the State's physical evidence in a more probative light. Police found human blood present on the carpeting of Defendant's truck, but the blood samples failed to produce identifiable DNA. The inverse was true of the padding beneath the carpet, with analysis verifying the presence of Ms. Tucker's DNA, but the lab was unable to confirm human blood as the source. Police also uncovered evidence that Defendant kept carpet cleaners in his home and bleach at the workshop on the Mott property where Ms. Tucker's body was found. While these two facts alone are not incriminating, it takes on probative value

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alongside: (1) testimony that Defendant admitted to cleaning his vehicle *during the investigation of Ms. Rippy's disappearance*; and (2) expert testimony that chemical cleaners may have caused the deterioration of the samples found in Defendant's car. In short, the investigation into Ms. Rippy's disappearance is inseparable from Ms. Tucker's murder. The trial court did not err in allowing this evidence to "enhance the natural development of the facts" because it was "necessary to complete the story of the charged crime for the jury." *Id.* (citations omitted).

¶ 42 We also disagree with Defendant's characterization of the similarities between Ms. Rippy and Tucker as "superficial." He relies on our decision in *State v. Gray*, 210 N.C. App. 493, 512, 709 S.E.2d 477, 490 (2011), for the proposition that the similarities between the two women were so generic as to be inconsequential. But the similarities noted by the trial court in this case are more numerous and probative than those found inadequate in *Gray*. In that case, the alleged 404(b) victim and the alleged victim in the crime charged were of different sexes, in different states, and victims of different sex acts, with the only similarities being their youth and that the defendant had access to both through social relationships. 210 N.C. App. at 512–13, 709 S.E.2d at 490–91.

¶ 43 Here, by contrast, both victims: (1) were residents of the Wilmington area; (2) were of the same sex; (3) disappeared within nine months of each other at most, prompting missing persons reports from their mothers; (4) had legal, financial, and substance abuse problems, facts particularly pertinent given Ms. Sitosky's testimony that Defendant supplied her with money under like circumstances; (5) relied on Defendant for transportation; (6) had "sustained relationships" with Defendant; and (7) were subjects of his sexual attention. The similarities noted by the trial court were sufficient to warrant admission of evidence about Ms. Rippy under Rule 404(b). *See State v. Hembree*, 368 N.C. 2, 12, 770 S.E.2d 77, 84–85 (2015) (holding evidence of uncharged murder was sufficiently similar under Rule 404(b) when the trial court found both female victims were murdered, white, prostitutes, drug users, located in the same county, and acquaintances and sexual partners of the defendant).

e. The Trial Court Did Not Err Under Rule 403

¶ 44 [2] Defendant argues the trial court abused its discretion in concluding the evidence of Ms. Rippy's disappearance was more probative than prejudicial under Rule 403, relying principally on *Hembree*. Because *Hembree* is distinguishable and the trial court appears to have carefully considered potential prejudice, we hold the Defendant has failed to show the trial court abused its discretion in this ruling.

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¶ 45

In *Hembree*, the bodies of two murdered women were discovered independently in South Carolina; one was left half-naked in a culvert, while the other was found burned along a dirt road. 368 N.C. at 4, 770 S.E.2d at 80. The defendant—who at one point confessed to murdering both women in North Carolina before disposing of them across the border—was tried for the murder of the half-naked woman. *Id.* Prior to trial, the State moved to introduce evidence of the burned woman’s murder under Rule 404(b). 368 N.C. at 6, 770 S.E.2d at 81. The trial court admitted that evidence under Rules 404(b) and 403, concluding it showed a common plan or scheme and was more probative than prejudicial. *Id.* Once trial commenced, however, the State focused primarily on the death of the burned woman, introducing at least sixteen graphic photographs of the burned body and testimony from a witness describing what the burned body felt like to touch. *Id.* at 6–7, 770 S.E.2d at 81–82. The State also introduced evidence of the cause of death for both women; while there was some evidence that the half-naked woman had died an accidental death by cocaine overdose, the State’s evidence that the burned woman had died by strangulation was “more certain.” *Id.* at 7, 770 S.E.2d at 82. In fact, on the whole, “there was more evidence presented concerning the [burned woman’s] murder than there was for the murder” actually being tried. *Id.*, 770 S.E.2d at 81 (quotation marks omitted). Defendant was convicted of the half-naked woman’s murder, sentenced to death, and appealed. *Id.* at 9, 770 S.E.2d at 83.

¶ 46

On appeal, our Supreme Court held that the trial court erred in admitting the evidence of the burned woman’s death. *Id.* at 16, 770 S.E.2d at 87. The Court reached that result based for four reasons: (1) the central issue at trial was the victim’s unclear cause of death, and the certainty provided by the evidence that the burned woman was strangled “likely weighed heavily in the jury’s deliberations[;]” (2) the State introduced testimony from a witness who described what it felt like to touch the burned body alongside more than a dozen “stark and unsettling” photographs of the charred remains; (3) evidence of the burned body focused on the differences between the two deaths “rather than a similarity as anticipated under Rule 404(b)[;]” and (4) “the lack of an obvious connection between the offenses” rendered the 404(b) evidence less probative than in other cases. *Id.* at 14–16, 770 S.E.2d at 86–87. Thus, because the victim’s “cause of death was uncertain, and the Rule 404(b) evidence was so emotionally charged,” our Supreme Court held the trial court erred by admitting:

an excessive amount of evidence about [the burned woman], particularly photographic evidence, when

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the probative value of the sum total of that evidence was substantially outweighed by the risks that it would confuse the issues before the jury, or lead the jury to convict based on evidence of a crime not actually before it.

Id. at 16, 770 S.E.2d at 87.

¶ 47 *Hembree* is distinguishable from this case. First, unlike in *Hembree*,⁵ there is an obvious connection between the disappearances of Meses. Rippy and Tucker, as revealed by the two police investigations that became intertwined. Second, this case did not involve 404(b) evidence in the form of highly inflammatory and gruesome photographs of Ms. Rippy that ran the risk of inflaming the jury's passions; the only graphic images the jury saw were those of Ms. Tucker's dismembered body. Third, the evidence did not serve to highlight the differences between Meses. Rippy and Tucker. Instead, the evidence admitted demonstrated how Defendant targeted both women pursuant to a common plan or scheme. Lastly, there was substantial evidence beyond Ms. Rippy's disappearance introduced by the State, including the testimonies of Ms. Sitosky and Mr. Koke linking Defendant to Ms. Tucker, the discovery of Ms. Tucker's body at a location Defendant was responsible for clearing and maintaining, the presence of Ms. Tucker's DNA alongside human blood on the flooring of Defendant's car, and the recovery of duct tape from Defendant's home consistent with tape used to bind Ms. Tucker's body. Given these distinctions, *Hembree* is inapposite.

¶ 48 The trial court's deliberate and discretionary weighing of potential unfair prejudice against the evidence's probative value is also pertinent to our analysis. In its order, the trial court excluded evidence of Defendant's short stories about serial killers as more prejudicial than probative under Rule 403, "indicating [its] careful consideration of the evidence." *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161. The order further discloses that the trial court conducted this analysis as to the 404(b) evidence that was admitted, concluding "[t]hat the danger of unfair prejudice does not substantially outweigh the relevance of this

5. We note that in *Hembree*, the Supreme Court surveyed instructive cases from other jurisdictions and found *Flowers v. State*, 773 So.2d 309 (Miss. 2000), in which evidence of three other murders was admitted in the trial of a fourth murder, most similar. It then quoted a lengthy excerpt from *Flowers*, including the following language: "It is the 'necessity' by the State to use the other evidence of three killings in order to tell a coherent story that is the key to its admissibility. *The case at bar is not one of those cases so interconnected that mention of the other three murders is necessary to tell the whole story.*" *Hembree*, 368 N.C. at 15, 770 S.E.2d at 86 (quoting *Flowers*, 773 So.2d at 324) (emphasis added).

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evidence to the disappearance of Rippy in connection with the current trial for Tucker's murder." And the trial court admitted 404(b) evidence with an appropriate limiting instruction. We cannot say that the trial court abused its discretion under Rule 403 given the factors above. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161 (holding no abuse of discretion in the admission of Rule 404(b) evidence under Rule 403 for these reasons).

2. Closing Arguments

¶ 49

Defendant next contends that the trial court erred at closing argument in: (1) allowing the prosecutor to argue Ms. Tucker's blood was found in Defendant's car over Defendant's objection; (2) allowing the prosecutor to rely on 404(b) evidence of Ms. Rippy's disappearance for purposes outside those for which it was admitted; (3) denying Defendant's mistrial motion when the prosecutor's argument impermissibly shifted the burden of proof of guilt to the defense; (4) denying Defendant's mistrial motion after the prosecutor suggested the presence of second-degree murder on the verdict sheet meant Defendant had invited such a conviction; and, (5) failing to intervene *ex mero motu* after the prosecutor argued his personal opinions to the jury. After review of the record under the mandated highly deferential standards of review, we hold that Defendant has failed to show prejudicial error individually or collectively.

a. Standards of Review

¶ 50

A trial court's ruling on defendant's objection to closing argument is reviewed for abuse of discretion. *State v. Lopez*, 363 N.C. 535, 538, 681 S.E.2d 272, 273 (2009) (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)). So, too, is a trial court's denial of a motion for mistrial. *State v. Williams*, 7 N.C. App. 51, 52, 171 S.E.2d 39 (1969). We will hold the trial court abused its discretion only when its ruling "could not have been the result of a reasoned decision." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (citation and quotation marks omitted). Application of this standard in the context of closing arguments requires us to "first determine[] if the remarks were improper. . . . Next, we determine if the remarks were of such magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* Prejudice is identified by "assess[ing] the likely impact of any improper argument in the context of the entire closing," *State v. Copley*, 374 N.C. 224, 230, 839 S.E.2d 726, 730 (2020) (citations omitted), and by "look[ing] to the evidence presented by the State to determine whether there is a reasonable possibility the jury would have acquitted defendant if the

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prosecutor's remarks had been excluded." *Id.* at 231, 839 S.E.2d at 730 (citations omitted).

¶ 51 Closing arguments that fail to garner an objection when made are reviewed to determine whether the "remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. To show gross impropriety, a defendant must demonstrate that "the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994) (citations and quotation marks omitted). "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

¶ 52 Both the trial court and the prosecutor enjoy significant leeway at closing argument. *See State v. Cummings*, 361 N.C. 438, 465, 648 S.E.2d 788, 804 (2007) ("[T]he trial court has broad discretion to control the scope of closing arguments." (citations omitted)); *State v. Flowers*, 347 N.C. 1, 36, 489 S.E.2d 391, 411 (1997) ("[P]rosecutors are given wide latitude in the scope of their argument." (citation omitted)). A prosecutor may therefore "argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom," *Flowers*, 347 N.C. at 36–37, 489 S.E.2d at 412 (citation omitted), but is prohibited from "plac[ing] before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *Id.* at 36, 489 S.E.2d at 412 (citation and quotation marks omitted). In discerning whether the prosecutor's remarks were improper, "we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) (citation and quotation marks omitted).

b. Statements About Ms. Tucker's Blood

¶ 53 **[3]** The prosecutor repeatedly argued during closing that Ms. Tucker's blood was present in Defendant's car, and Defendant objected to these statements numerous times. The trial court overruled these objections each time.

¶ 54 A prosecutor may argue any reasonable inferences from the evidence introduced at trial. *State v. Boyd*, 214 N.C. App. 294, 305–06, 714 S.E.2d 466, 475 (2011). Here, the State introduced expert testimony and

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lab results showing the conclusive presence of human blood on sections of carpeting and padding of the driver's seat flooring in Defendant's car, though no DNA samples were recoverable from those sections. Other evidence produced opposite results, as Ms. Tucker's DNA was found on a section of the floor padding that returned inconclusive (but not negative) results for human blood. The State's experts testified that these discrepancies may well have been the result of chemical cleaners, and other evidence showed Defendant had: (1) cleaned his car several times after Ms. Tucker disappeared; and (2) had bleach in his workshop and carpet cleaners in his home. Finally, the section of flooring containing Ms. Tucker's DNA does not appear prone to incidental contact with other sources of DNA, as it was located beneath both a rubber floor-mat and a layer of carpeting below the driver's seat. All of this evidence leads to a reasonable inference that the DNA—found alongside sections testing positive for human blood—was sourced from Ms. Tucker's blood. For these reasons, we hold the trial court did not err in overruling Defendant's objections to this portion of closing argument.

c. Statements About Ms. Rippy's Death

¶ 55 [4] Defendant also argues that the trial court erred in allowing the prosecutor, over Defendant's objections, to argue that Ms. Rippy was dead during closing arguments. Defendant takes specific issue with the prosecutor's statements in light of the trial court's admonition, made during the pre-trial 404(b) motion hearing, that it "want[ed] to make sure that there's no intention of the State ever going in with any witness and to ever discussing the death of Ms. Rippy Van Newkirk. It would just be, again, as to her disappearance."

¶ 56 Despite Defendant's argument to the contrary, the trial court's evidentiary rulings did not preclude the State from arguing in closing that Ms. Rippy was deceased. The State introduced testimony, without objection, that the Wilmington Police Department changed the internal designation of Ms. Rippy's investigation from a missing persons case to murder. Later, when Defendant requested the written internal report reflecting this new designation be redacted once in evidence, the State made clear its intention to argue to the jury that Ms. Rippy was dead:

[W]e're not saying that he's been convicted of that murder, which we all know in this room; but that's far different that saying that it's now termed a murder by WPD, which it is the second that he's arrested for it, which is the standard business practice of the WPD.

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... [W]e are not embracing the fact that Ms. [Rippy] might be in Tahiti right now. She's dead, and he did it. We're not saying he did it in front of this jury But we're not running from the fact that she's dead, and I intend to argue that she's dead in my closing argument.

The trial court then denied Defendant's motion, noting that the State had not sought to elicit any evidence of Defendant's conviction for Ms. Rippy's murder. Based on this evidentiary ruling made at trial,⁶ and given the trial court permitted the State to argue Ms. Rippy was dead over Defendant's objection, it appears the trial court only limited evidence of Defendant's *conviction* for Ms. Rippy's murder and did not intend to bar evidence suggesting—or arguments asserting—that she was dead.

¶ 57 Again, a prosecutor may argue “all the facts in evidence as well as any reasonable inferences that may be drawn from those facts,” *State v. Riley*, 137 N.C. App. 403, 413, 528 S.E.2d 590, 597 (2000), and it is reasonable to infer from the evidence presented that Ms. Rippy is deceased. The State introduced testimony that: (1) Defendant volunteered in a police interview that he “was the last person to see [Ms. Rippy] alive,” suggesting he believed Ms. Rippy could be dead; (2) the Wilmington Police Department reclassified Ms. Rippy's case from a missing persons investigation to first-degree murder; and (3) no one had located Ms. Rippy or her body after five years of continuing criminal and volunteer investigations into her whereabouts.⁷ Given this testimony, the trial court did not err in denying Defendant's objection to the prosecutor's argument that Ms. Rippy is dead based on a reasonable inference from the evidence presented.

¶ 58 Nor does it appear the prosecutor referenced the death of Ms. Rippy for an improper purpose. Instead, the prosecutor used that inference

6. We note that pre-trial rulings on the admissibility of evidence are preliminary, and the trial court's final determination is made at the time evidence is introduced. *See State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (“Rulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial” (citation and quotation marks omitted)).

7. Although North Carolina law governing the estates of missing persons has abolished the common law presumption of death based on absence, N.C. Gen. Stat. § 28C-1 (2019), we note that the modern trend amongst jurisdictions is to recognize a presumption of death after five years. *See* Am. Jur. 2d Death § 399 (2021) (noting that the Uniform Probate Code provides for a presumption of death after five years' absence and is now “followed in several jurisdictions”). The State commenced closing arguments in this case ten days prior to the five-year anniversary of Ms. Rippy's disappearance.

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to downplay Defendant's anticipated attempts "to say that there's a lot of differences between these women" and to emphasize an additional similarity between them to show "who's the identity of the killer, [Ms. Tucker's] killer. It goes to is there a motive, is there a plan, is there a modus operandi." Later, the prosecutor argued "I want to be very clear, I am not asking that you punish him for [Ms. Rippy's] case today. In fact, that is absolutely an impermissible use. Instead, what it does is it goes to modus operandi." The remaining mentions of Ms. Rippy's death likewise show the inference was drawn for the jury for these permissible purposes. Read in context, alongside the trial court's specific instruction to the jury that evidence of Ms. Rippy's disappearance could only be used for the limited permissible purposes outlined above, we hold that Defendant has failed to demonstrate any abuse of the trial court's wide discretion in overruling his objections to these statements by the prosecutor. *See, e.g., State v. Murillo*, 349 N.C. 573, 603–4, 509 S.E.2d 752, 770 (1998) (holding prosecutor's argument that the defendant—an expert marksman who was previously convicted for involuntary manslaughter in shooting of his first wife and was now on trial for first-degree murder in the shooting death of his fourth wife—likely did not accidentally shoot both wives was not improper when it was a reasonable inference from the evidence and was argued for a proper 404(b) purpose).

d. Prosecutor's Burden-Shifting and Verdict Sheet Comments

¶ 59 [5] Defendant next asserts that the trial court erred in denying his motion for a mistrial after it sustained Defendant's objections to comments from the prosecutor that suggested Defendant: (1) bore the burden of proving his own innocence; and (2) was responsible for the inclusion of second-degree murder as a lesser-included offense on the verdict sheet. Defendant's counsel immediately objected to the comments, the trial court sustained the objections after hearing arguments outside the presence of the jury, and the trial court gave curative instructions to the jury once closing statements resumed. Defendant asserts on appeal that the curative instructions were inadequate; our precedents, however, lead us to hold otherwise.

¶ 60 Our Supreme Court has held that "[w]here, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982) (citations omitted). We have applied this rule to hold that any prejudice in a prosecutor's closing argument was cured when the defendant timely objected, the court held a bench conference to resolve the objection, and the trial judge issued a cura-

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tive instruction once proceedings resumed. *State v. Peterson*, 179 N.C. App. 437, 468–69, 634 S.E.2d 594, 617 (2006). Our Supreme Court has noted such curative instructions may serve to alleviate prejudice even when the record shows the instruction was both incomplete and somewhat untimely. *See State v. Barden*, 356 N.C. 316, 381–82, 572 S.E.2d 108, 149 (2002) (declining to hold a delayed, incomplete, and ambiguous instruction was ineffective “because a jury is presumed to follow a court’s instructions” (citation omitted)). The curative instructions provided in this case fall within the holdings in *Woods*, *Barden*, and *Peterson*. The trial court did not err in denying Defendant’s motions for mistrial under these circumstances.

e. Statements of Personal Opinion

¶ 61 [6] Defendant further argues that the trial court erred in not intervening *ex mero motu* to the comments by the prosecutor about “evil.” Those statements, in the context of the prosecutor’s larger argument, are as follows:

The world is a beautiful place and there is good in it.
 . . . We know that there’s good in the world because
 [our children] are born innocent and playful.

. . . .

But, you know, the job of a parent, of course, is to keep our children from harm. And just as there is good and beauty in the world, *there’s also evil*. And you don’t need a law degree to know what this is. *This, ladies and gentlemen, is pure evil*.

I’m not going to show you the contents of inside that bag. You’ve seen it. Suffice it to say, it’s heinous, it’s brutal, it’s a lonely way to die.

. . . .

The world is a beautiful place. . . . *You know, sometimes evil wears a mask*. Sometimes you have to dip below the surface. *Sometimes evil is readily apparent*, like when you’re looking at *the grotesque deformities on the body of Rose’s baby [Ms. Tucker]*. *But, no, when you’re looking at this defendant, you have to dip below the surface*.

(Emphasis added). Defendant asserts that these comments were particularly improper because the prosecutor displayed a posterboard to

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the jury with a picture of Defendant—who is Black—alongside images of Ms. Tucker, Sitosky, and Rippy—all of whom are white.

¶ 62 Presuming, *arguendo*, the prosecutor’s statements were referring to Defendant—rather than the murder of Ms. Tucker—as evil, such derogatory comments do not rise to the level of gross impropriety requiring the trial court’s intervention *ex mero motu*. See *State v. Larrimore*, 340 N.C. 119, 163, 456 S.E.2d 789, 812–13 (1995) (holding prosecutor’s statements that the defendant was “*the ultimate*[,] . . . *the quintessential evil*” and “*one of the most dangerous men in this State*” were not grossly improper (emphasis in original)). The trial court gave Defendant an opportunity to review the posterboard before it was shown to the jury, and Defendant’s counsel told the court that “we don’t have any objection to—to what [the prosecutor] is going to introduce.” Additionally, the jury was already well aware of the races of Defendant and Ms. Tucker, Sitosky, and Rippy without the use of the State’s visual aid; Defendant was present in the courtroom for trial, Ms. Sitosky testified before the jury, and the State introduced photographs of Ms. Tucker and Rippy into evidence and published them to the jury. Finally, the prosecutor never drew attention to or referenced the races of Defendant or the three women in closing. While we are cognizant of racial bias, we do not see any gross impropriety in the prosecutor’s conduct given that: (1) Defendant did not object to the prosecutor’s comments about evil or the use of the posterboard; (2) neither the prosecutor nor the posterboard commented on race; (3) the posterboard did not implicate race beyond the inclusion of photographs of persons the jury had already observed over the several days of trial; and (4) Defendant points to no caselaw where gross impropriety has been found on this theory. As such, we decline to hold that the trial court erred in failing to intervene *ex mero motu*.

f. Cumulative Prejudice in Closing Argument

¶ 63 Defendant concludes his discussion of closing arguments by asserting that the cumulative effect of the alleged improper remarks is so prejudicial as to warrant a new trial. Having held that Defendant has not shown error in the trial court’s actions during closing argument, we further hold that Defendant cannot show error through cumulative prejudice.

3. Motion to Dismiss

¶ 64 [7] Defendant also asserts that the trial court erred in denying his motion to dismiss the first-degree murder charge for insufficient evidence of premeditation and deliberation with specific intent to kill. We hold the trial court did not err based on the evidence when taken in the light most favorable to the State.

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a. Standard of Review

¶ 65

We review the denial of a motion to dismiss for insufficiency of the evidence *de novo*. *State v. Phachoumphone*, 257 N.C. App. 848, 861, 810 S.E.2d 748, 756 (2018). Denial is proper when “there is substantial evidence (1) of each essential element of the offense charged . . . , and (2) of defendant’s being the perpetrator of such offense.” *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is defined as “relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.” *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). Further, “[a]ny contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered.” *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted).

b. Evidence of Premeditation and Deliberation

¶ 66

Premeditation and deliberation are necessary elements of first-degree murder. N.C. Gen. Stat. § 14-17(a) (2019). Our Supreme Court has defined premeditation and deliberation as follows:

Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing. Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

An unlawful killing is deliberate and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant’s ability to reason.

State v. Hunt, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (citations omitted).

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¶ 67 Circumstantial evidence showing premeditation and deliberation includes, but is not limited to, the following:

- (1) want of provocation on the part of the deceased,
- (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by the defendant, ill will or previous difficulty between the parties, and (4) evidence that the killing was done in a brutal manner.

State v. Bullard, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984) (citation omitted). Other circumstantial evidence may include “the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled.” *State v. DeGregory*, 285 N.C. 122, 129, 203 S.E.2d 794, 800 (1974) (citations omitted). Also pertinent is “any unseemly conduct towards the corpse of the person slain, or any indignity offered it by the slayer, as well as concealment of the body.” *State v. Sokolowski*, 351 N.C. 137, 145, 552 S.E.2d 65, 70 (1999) (citation omitted).

¶ 68 Defendant argues that the State’s circumstantial evidence in this case was insufficient to allow a reasonable inference that he acted with premeditation and deliberation in killing Ms. Tucker, contending that: (1) the killing was not particularly “brutal” as the term is used in the first-degree murder context; and (2) the Defendant’s disposal and concealment of the body was more indicative of Defendant’s mindset after the killing than before it.

¶ 69 Relevant caselaw on whether a killing was brutal and thus indicative of premeditation and deliberation does not support Defendant’s position. For example, in *State v. Hager*, 320 N.C. 77, 83, 357 S.E.2d 615, 618 (1987), our Supreme Court held that a murder was completed in a brutal manner when the victim “died as a result of the defendant’s vicious beating of him about the head with the butt of a rifle with such force as to cause an intracranial hemorrhage.” The medical examiner in this case testified that Ms. Tucker died from four lacerations to her skull and internal epidural hemorrhaging from repeated blunt force trauma. Ms. Tucker also suffered even more grievous wounds, including: (1) hemorrhaging in her neck from strangulation or blunt force;⁸ and

8. While the evidence was inconclusive as to whether the neck hemorrhage was caused by strangulation or blunt force trauma, we note that “[t]he jury may infer premeditation and deliberation from the circumstances of a killing, *including that death was by strangulation.*” *State v. Richardson*, 328 N.C. 505, 513, 402 S.E.2d 401, 406 (1991) (citations omitted) (emphasis added). Thus, the injury to Ms. Tucker’s neck suggests premeditation and deliberation, whether it was inflicted by strangulation or blows beyond those to her ribs and skull.

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(2) four broken ribs caused by blunt force trauma inflicted at the time of death. While Defendant points to cases involving even more extreme attacks than those shown here to argue that this case did not include a brutal killing, the incidence of more barbaric murders does nothing to diminish the viciousness of Ms. Tucker's murder.

¶ 70 We are similarly unconvinced by Defendant's contention that the manner and method of the disposal of Ms. Tucker's body does not show premeditation. Our caselaw is replete with holdings that postmortem mistreatment and concealment of a body may support a reasonable inference of premeditation and deliberation. *See, e.g., State v. Pridgen*, 313 N.C. 80, 94, 326 S.E.2d 618, 627 (1985) (holding evidence that "[t]he body was concealed at the side of a deserted dirt path" showed premeditation and deliberation); *State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 527 (1994) (holding "evidence of an elaborate process of removing the body," including hiding and eventually burning the body, was "evidence from which a jury could infer premeditation and deliberation"), *abrogated on other grounds, State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001); *Sokolowski*, 351 N.C. at 149, 522 S.E.2d at 72 ("[T]his Court has held that unseemly conduct towards a victim's corpse and efforts to conceal the body are relevant as circumstantial evidence of premeditation and deliberation." (citing *Rose*, 335 N.C. at 318, 439 S.E.2d at 527); *State v. Parker*, 354 N.C. 268, 280–81, 553 S.E.2d 885, 895 (2001) (holding defendant's attempt to cover up the crime by mistreating and concealing the body in a car on a dirt road and otherwise disposing of physical evidence was indicative of premeditation and deliberation); *State v. Dawkins*, 162 N.C. App. 231, 240, 590 S.E.2d 324, 331 (2004) (holding "evidence of an elaborate process of concealing the body by wrapping it in a towel, blanket, and trash bag; weighing the body down with weights and anchors; transporting the body to [a lake]; and disposing of the laden body to sink after the victim had been killed" was "evidence from which the jury could permissibly infer premeditation and deliberation").

¶ 71 In this case, the State introduced substantial evidence of: (1) undignified treatment and concealment of Ms. Tucker's body; and (2) efforts to destroy evidence of the murder. Police located Ms. Tucker's body in a shallow grave beneath a tree stump in the back corner of a rural field. The body had been stripped naked, arranged in a fetal position, and was bound with duct tape. Ms. Tucker's corpse was wrapped in three black trash bags before being transported to the grave and buried. The State introduced additional evidence suggesting Defendant sought to conceal his handling of the body by using chemical cleaners to wash the interior

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of his vehicle following Ms. Tucker's disappearance. We have no difficulty holding, based on our precedents, that the above conduct, coupled with the brutal nature of the killing, suffices to support a reasonable inference of premeditation and deliberation on the part of Defendant when viewed in the light most favorable to the State.

4. Cumulative Prejudice

¶ 72 In his final argument, Defendant asserts that all of the above errors, if insufficiently prejudicial standing alone, were so cumulatively prejudicial as to warrant a new trial. As discussed above, Defendant has failed to show any error by the trial court, and we hold that Defendant cannot show cumulative prejudice absent such error.

III. CONCLUSION

¶ 73 For the foregoing reasons, we hold Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA

v.

JALEN TIWAYNE BRAKE

No. COA20-476

Filed 21 September 2021

Rape—first-degree rape—second-degree sexual offense—convictions not mutually exclusive

The trial court did not err by accepting the jury's verdicts finding defendant guilty of both first-degree forcible rape and second-degree forcible sexual offense, even though the rape conviction required the jury to find defendant inflicted serious personal injury on the victim while the sexual offense conviction did not. Even if the verdicts had been inconsistent, they were still valid because defendant committed two separate acts, each of which supported one conviction, and therefore the convictions were not mutually exclusive (that is, guilt of one crime did not exclude guilt of the other), and because the State presented substantial evidence as to each element of each crime.

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Appeal by defendant from judgments entered 2 October 2019 by Judge Marvin K. Blount III in Wilson County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant-appellant.

TYSON, Judge.

¶ 1 Jalen Tiwayne Brake (“Defendant”) appeals a jury’s verdict finding him guilty of first-degree forcible rape and second-degree forcible sexual offense and claims the two convictions are inconsistent and contradictory. We find no error.

I. Background

¶ 2 “B.J.” traveled to Wilson, North Carolina on 7 October 2017 to attend a trail ride (the parties agree to use of a pseudonym to protect the identity of the complainant). The trail ride included an event with tents, concessions, and dancing. B.J. attended the trail ride with her friends, Kristen Johnson, Tara Beaver, and Tara’s daughter. B.J. admittedly consumed “a significant amount” of vodka during the three-hour drive enroute to the trail ride. The four women arrived in Wilson between 9:00 p.m. and 11:00 p.m. B.J. was intoxicated.

¶ 3 The four women went to the dance floor when they arrived. A disc jockey was playing music and some attendees were dancing. The four women met with Darius Tysor, a friend of both Tara and Kristen.

¶ 4 Defendant, who had recently turned sixteen, was attending the trail ride with his family. Defendant testified he had consumed four or five shots of corn liquor and four beers that evening. Defendant was present on the dance floor and testified B.J. was drunk, and “she was falling all up on me, grabbing on me . . . and she was just pushing her body up against me and everything.”

¶ 5 After some time, Tara, Kristen, and Darius went to their car to get water, leaving B.J. on the dance floor with Defendant. B.J. testified she danced with Defendant and then “walked off with him,” but she could not recall “why.” Defendant and B.J. walked far enough away that they were not within eyesight of the dance floor.

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¶ 6 B.J. testified Defendant became physically forceful with her. He got on top of her, kissed her, and “tr[ied] to do stuff.” B.J. testified, “he kept being really forceful so I just remember thinking in my head, [B.J.], just relax, sit back and act like you’re going to be okay so you can kind of catch him off guard and I kicked him.”

¶ 7 B.J. told Defendant “no” and to “stop,” and she kicked him and punched at him. Defendant stood up. B.J. thought the incident was over, so she started to stand up. When B.J. got onto her knees, Defendant hit her in the face and the back of her head.

¶ 8 B.J. testified, “I was on my knees and he was standing over me just like pummeling my head. I was crying. He kept telling me to shut the f**k up, bitch, don’t, stop crying.” B.J. continued, “I thought he was going to break my teeth out . . . I didn’t know if he was going to hit me in just the wrong spot and it was going to kill me.”

¶ 9 Defendant stopped hitting B.J., pulled his pants down and inserted his penis into her mouth. Defendant told B.J. if she bit him, he would “f**k**g kill” her. Defendant repeated this warning several times. B.J. testified, “at that point I just decided to stop fighting because I didn’t want him to kill me . . . I’ve never experienced anything like it. And I was just terrified.” She stated Defendant was not “all the way erected” when his penis was thrust into her mouth.

¶ 10 Defendant pushed B.J. onto the ground upon her back, he removed her pants, boots, and underwear and got on top of her. B.J. was not sure if Defendant fully penetrated her, but testified she could feel the pressure. Defendant then stood up, pulled his pants halfway up, pulled his belt around, and walked away towards the tent area.

¶ 11 B.J. arose from the ground. She put on her pants but left off her boots. She walked to the dance floor to find a law enforcement officer. B.J. found deputies and told them she had been assaulted. She was taken to the hospital in an ambulance.

¶ 12 B.J.’s injuries were photographed at the hospital. These photographs showed her face was swollen and bruised. The photographs also documented redness on the back of her head from being repeatedly hit, a scratch on her right arm, swelling of her left arm from blocking Defendant’s blows, scratches on her back and thighs, and redness on her knees. While at the hospital, B.J. was administered a rape kit, samples were collected, and she was examined by a physician.

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A. Darius Tysor's Testimony

¶ 13 Darius testified he went to the trail ride to meet with Tara and Kristen. Darius did not drink because he had planned to drive the four women home. Darius met the four women on the dance floor when they arrived. When Tara and Kristen went to the car to get water, Darius went with them. Darius noticed B.J. was dancing with Defendant as the group walked away from the dance floor. When the group returned to the dance floor, B.J. and Defendant were gone.

¶ 14 Darius and Kristen looked for B.J. around the campground. The next time they saw B.J., she was walking towards the deputies on the side of the dance floor. Darius testified B.J. looked like she had been beat up and was hysterical. Darius said B.J. was not wearing her boots.

¶ 15 Darius and Kristen looked for B.J.'s boots and found them lying beside a fence about 100 to 150 yards from the dance floor. After they found the boots, they began to look for Defendant.

B. Kristen Johnson's Testimony

¶ 16 Kristen Johnson testified she recalled seeing B.J. dance with Defendant. B.J. asked for water, so the group left B.J. on the dance floor and went to the car. When they returned, B.J. was no longer on the dance floor.

¶ 17 Kristen testified that she and Darius began looking for B.J. and Defendant. Kristen testified the next time she saw B.J. it was about 20-30 minutes from the last time she had seen her. Kristen testified she saw B.J. with some deputies, and Kristen "started freaking out because I could see her face so I went up to her and I said, who did this to you. I thought she had got (sic) jumped, her injuries were so bad." Kristen said B.J. was crying and replied, "He did it." When deputies asked if B.J. had been seen, or had danced with any other men that night, Kristen stated B.J. had not.

¶ 18 Kristen and Darius spoke with Defendant's uncle who took them to the tent where Defendant was located. Kristen observed Defendant was face down in the tent and he appeared to be "passed out." Defendant had dirt and grass on the back of his shirt. Defendant's pants were down around his knees.

C. Deputy Moore's Testimony

¶ 19 Wilson County Sheriff's Deputy Shonday Moore ("Deputy Moore") was working security at the trail ride on 7 October 2017. Deputy Moore

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was standing near the dance floor with some other officers when he saw B.J. a little after midnight. Deputy Moore testified B.J. was staggering towards them and appeared to have been involved in an altercation. B.J. had swollen facial features and grass stains all over her clothes. B.J. reported she had been assaulted.

¶ 20 Deputy Moore noticed that B.J.’s pants were unzipped, and she was not wearing any shoes. B.J. had grass stains on her socks and clothes and had grass in her hair as well. Deputy Moore asked if “things went further,” and B.J. said that she did not know if penetration had taken place, but she told Deputy Moore the subject had tried, but she was unsure of the extent of the assaults. B.J. described her attacker as a black male with short, dreadlock-like style hair.

¶ 21 Deputy Moore testified B.J. was “tore all to pieces,” very upset, became hysterical and started to hyperventilate. The prosecutor asked Deputy Moore at trial, “did [B.J.] tell you whether or not she fought back or not?” Deputy Moore replied, “She did tell me that she did fight back. She said she was fighting back but it wasn’t working.”

D. Detective Jackson’s Testimony

¶ 22 Wilson County Sheriff’s Detective Julie Jackson (“Detective Jackson”) was called to the hospital where B.J. was taken to investigate her assault. Detective Jackson arrived at the hospital shortly after 1:20 a.m. and interviewed B.J.

¶ 23 B.J. told Detective Jackson the “individual that she was on the dance floor with was the subject she walked away with and went to the woods with.” B.J. told Detective Jackson about the altercation and the subject had “possibly tried to penetrate her but she was unsure if penetration was made.”

¶ 24 Defendant was arrested and transported to the sheriff’s department. Detective Jackson went to the sheriff’s office and collected an oral DNA swab from Defendant.

E. DNA Evidence

¶ 25 A registered nurse collected various samples from B.J. for the rape kit while B.J. was at the hospital. One sample was a vaginal swab.

¶ 26 April Perry (“Perry”), a forensic scientist and body fluid analyst at the North Carolina State Crime Laboratory, testified at trial. Perry testified she examined the smear associated with the vaginal swabs under a microscope and identified sperm on the slide. Perry stated she forwarded the smear for DNA analysis. Perry noted that the sperm she had

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observed on the smear were intact with the tails still attached, indicating they had been deposited into the vagina less than 12 to 24 hours prior.

¶ 27 Erin Wolfe (“Wolfe”), a forensic scientist at the North Carolina State Crime Laboratory, testified as an expert in DNA analysis. Wolfe was assigned to perform the DNA analysis for B.J.’s vaginal swabs and Defendant’s known blood sample. Wolfe’s analysis determined the major contributor profile of the DNA from the swab sample obtained from inside B.J.’s vagina at the hospital matched the Defendant’s DNA profile.

F. Detective Rouse’s Testimony

¶ 28 Wilson County Sheriff’s Detective Michael Rouse (“Detective Rouse”) interviewed Defendant around 1:00 a.m. on 8 October 2017. Detective Rouse asked Defendant if there was any reason Defendant’s DNA would be anywhere on the victim. Defendant said no, and he denied having sexual intercourse with anyone that night.

G. Defendant’s Testimony

¶ 29 Defendant testified he had danced with B.J. on the dance floor. He stopped dancing with her and walked away. Defendant claims B.J. returned and started dancing with him again. Defendant and his friends discussed how B.J. was pressing against him on the dance floor. Defendant testified he left the dance floor by himself and went to his tent.

¶ 30 Defendant further testified B.J. subsequently went into Defendant’s tent with his friend, Stephon. Defendant claims he and B.J. had consensual sex. B.J. left the tent and walked off with Stephon. Defendant then went to sleep. Stephon did not testify at trial.

II. Procedural history

¶ 31 Defendant was indicted for one count of first-degree forcible rape under N.C. Gen. Stat. § 14-27.21, one count of first-degree forcible sexual offense under N.C. Gen. Stat. § 14-27.26, and one count of misdemeanor assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1). Prior to trial, the State dismissed the misdemeanor charge.

¶ 32 At trial, after the conclusion of the State’s evidence, defense counsel moved to dismiss Defendant’s charge of first-degree forcible rape. This motion was denied. Counsel renewed this motion at the conclusion of all evidence. This motion was also denied.

¶ 33 The jury returned verdicts and found Defendant guilty of first-degree forcible rape and second-degree forcible sexual offense. The trial judge sentenced Defendant to a term of active imprisonment of 240 to 348

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months for the first-degree forcible rape conviction and 73 to 148 months imprisonment for the second-degree forcible sexual offense, with the sentences to run concurrently. Defendant appealed.

III. Jurisdiction

¶ 34 This appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444(a) (2019).

IV. Issue

¶ 35 Whether the trial court erred by accepting the jury's verdicts finding Defendant guilty of first-degree rape and second-degree sexual offense when the former verdict requires the jury to find Defendant inflicted serious injury on the prosecuting witness and the latter verdict does not.

V. Standard of Review

¶ 36 Where a defendant asserts an issue of inconsistent verdicts, the standard of review is *de novo*. *State v. Blackmon*, 208 N.C. App. 397, 403, 702 S.E.2d 833, 837 (2010).

VI. Analysis

¶ 37 Defendant asserts the jury's verdicts finding him guilty of first-degree rape and second-degree sexual offense are inconsistent and contradictory. "[A] distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent and contradictory." *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010). "It is firmly established that when there is sufficient evidence to support a verdict, mere inconsistency will not invalidate the verdict." *Id.* (citation and internal quotation marks omitted). "[W]hen a verdict is inconsistent and contradictory, a defendant is entitled to relief." *Id.* (citation omitted).

¶ 38 Our Supreme Court has long held: "If two statutes are violated even by a single act and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute." *State v. Birkhead*, 256 N.C. 494, 500, 124 S.E.2d 838, 843 (1962) (alterations, citations and internal quotation marks omitted).

A. Indictments and Jury Verdicts

¶ 39 Defendant was indicted for first-degree forcible rape under N.C. Gen. Stat. § 14-27.21 and for first-degree forcible sexual offense under N.C. Gen. Stat. § 14-27.26.

¶ 40 The elements of first-degree forcible rape require the jury to find the defendant: (1) engaged in vaginal intercourse with another, (2) by

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force, (3) against the will of the other person, and (4) inflicted serious personal injury upon the victim. N.C. Gen. Stat. § 14-27.21(a) (2019). The elements of second-degree forcible rape involve the first three elements of first-degree rape, but not the fourth element of serious personal injury. N.C. Gen. Stat. § 14-27.22(a) (2019).

¶ 41 The elements of first-degree forcible sexual offense are: (1) engaged in a sexual act with another, (2) by force, (3) against the will of the other person, and (4) inflicted serious personal injury upon the victim. N.C. Gen. Stat. § 14-27.26(a) (2019). The elements of second-degree forcible sexual offense involve the first three elements of first-degree forcible sexual offense, but not the fourth element of serious personal injury. N.C. Gen. Stat. § 14-27.27(a) (2019).

¶ 42 Injuries to constitute “serious personal injury” have been held to include: “a bruised and swollen cheek, a cut lip, and two broken teeth.” *State v. Jean*, 310 N.C. 157, 170, 311 S.E.2d 266, 273 (1984).

¶ 43 Defendant argues that based upon the jury instructions, if the jury determined that Defendant had inflicted serious injury on B.J., the jury should have rendered verdicts of guilty of first-degree forcible rape and first-degree forcible sexual offense.

¶ 44 Defendant minimizes B.J.’s physical injuries sustained as a result of Defendant’s assaults. B.J.’s injuries were photographed and documented by medical professionals and testified to by several witnesses and law enforcement. Further, a conviction of second-degree forcible sexual offense does not require evidence and a finding of inflicting serious injury. *See* N.C. Gen. Stat. § 14-27.27(a). Defendant’s argument has no merit.

B. Two Counts Supported by Two Separate Acts

¶ 45 B.J. testified to the violence of Defendant’s attacks as she tried to stand up after Defendant tried to kiss her while laying on top of her upon the ground, “I remember like where he was hitting me I thought he was going to break my teeth out or something. I didn’t know if he was going to hit me in just the wrong spot and it was going to kill me.”

¶ 46 Defendant thrust his penis into B.J.’s mouth with threats of further violence to “kill” her, if she bit him. As B.J. testified, it was apparent to her at the beginning of the assault Defendant was unable to insert his penis because he did not have an erection. After Defendant removed his penis from B.J.’s mouth, he pushed her onto the ground, removed her jeans, boots and underwear, and attempted to thrust his penis into her vagina.

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¶ 47 The jury could have determined Defendant inflicted these serious personal injuries on B.J. to overcome her resistance to being raped and that he had committed the second-degree sexual offense, by forcing his penis into her mouth. Sufficient evidence supports the jury's determination Defendant's infliction of personal injuries on B.J. were all done by Defendant in order to forcibly rape her.

¶ 48 Even if the verdicts are inconsistent, they are not contradictory verdicts barred by our Supreme Court's ruling in *Mumford*. 364 N.C. at 399, 699 S.E.2d at 915. *Mumford* declares that jury verdicts may be influenced by many factors. *Id.*

[I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Id. at 399, 699 S.E.2d at 915.

¶ 49 Our Supreme Court held, “[t]hat the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible . . . verdicts cannot be upset by speculation or inquiry into such matters.” *Id.* (citation omitted). “[I]f the inconsistent verdicts are determined to be merely inconsistent, rather than mutually exclusive, then the verdicts will stand so long as the State has presented substantial evidence as to each element of the charges.” *Blackmon*, 208 N.C. App. at 403, 702 S.E.2d at 838 (citation omitted).

¶ 50 “Verdicts are mutually exclusive when a verdict purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other.” *Mumford*, 364 N.C. at 400, 699 S.E.2d at 915 (citation and internal quotation marks omitted).

¶ 51 Here, the jury reached their conclusion on the first-degree forcible rape and rendered a verdict of guilty of second-degree sexual offense. The jury's verdict could also be a demonstration of “lenity” towards Defendant and, the verdict should not be disturbed. *Id.* at 399, 699 S.E.2d at 915.

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¶ 52 These crimes are not mutually exclusive because guilt of one criminal act does not exclude guilt of the other. Sufficient evidence supports the guilty verdicts by the jury. Defendant has failed to show any prejudicial error and is not entitled to a new trial.

¶ 53 “If Defendant required greater specificity, he could have moved for a bill of particulars under N.C. Gen. Stat. § 15A-925 (2019) and/or for a special verdict sheet under N.C. Gen. Stat. § 15A-1340.16 (2019).” *State v. Flow*, 277 N.C. App. 289, 304, 2021-NCCOA-183 ¶ 70, 859 S.E.2d 224, 233 (2021).

VII. Conclusion

¶ 54 The evidence presented at trial supports each conviction under N.C. Gen. Stat. § 14-27.21 and a lesser-included offense under § 14-27.27. Defendant’s actions, resulting in the two distinct charges, are not inconsistent and mutually exclusive. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury’s verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

STATE OF NORTH CAROLINA

v.

WILLIS R. CLAGON, DEFENDANT

No. COA20-618

Filed 21 September 2021

1. Crimes, Other—intimidating a witness—variance between indictment and evidence—not fatal

In an assault trial where defendant was also charged with intimidating a witness, there was no fatal variance between the indictment for the intimidation charge and the State’s evidence where the variance did not affect an essential element of the offense and was therefore mere surplusage. Although the indictment alleged that defendant told a third person to tell a witness that defendant would have the witness deported if he testified about the assault, but there was no evidence that defendant told the third person to convey the message to the witness or that the witness received the message,

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the gist of the offense involved obstruction of justice and did not require the witness to actually receive the intimidating message.

2. Criminal Law—jury instructions—intimidating a witness—“attempted to deter”

There was no error in the trial court’s jury instruction—on the charge of intimidating a witness—that defendant “attempted to deter” a witness from testifying against defendant in an assault case, because that phrase was not a deviation from the pattern jury instructions and, even if it was, defendant failed to show it likely misled the jury in light of the entirety of the instructions.

3. Damages and Remedies—restitution—assault case—lack of supporting evidence

The trial court’s order requiring defendant to pay restitution in the amount of \$23,189.22 to the victim in a trial for assault with a deadly weapon inflicting serious injury was vacated for lack of any evidence to support that amount and the matter was remanded for rehearing.

Appeal by Defendant from judgments entered 19 November 2019 by Judge Walter H. Godwin, Jr., in Washington County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy Johnson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant.

GRIFFIN, Judge.

¶ 1

Willis R. Clagon (“Defendant”) appeals from two judgments entered upon a jury verdict for (1) assault with a deadly weapon inflicting serious injury and (2) intimidating a witness.¹ Defendant argues that (1) there was a fatal variance between the State’s proof and its charge of intimidating a witness; (2) the trial court erred by using the phrase “attempted to deter” in its jury instruction for the charge of intimidating a witness; and (3) the trial court’s restitution order was unsupported by the State’s evidence. We discern no error in the first two issues. We vacate and remand on the issue of restitution.

1. Defendant also filed a petition for writ of certiorari to appeal an order finding him in criminal contempt. We deny the petition.

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I. Factual and Procedural Background**A. Indictment**

¶ 2 On 8 April 2019, Defendant was indicted for (1) assault with a deadly weapon inflicting serious injury (“AWDWISI”) and (2) intimidating a witness. The indictment for intimidating a witness stated, in pertinent part, that “[t]he intimidation consisted of [Defendant] telling Darryl Derstine to tell Nicholas Ramos that he would have Nicholas Ramos deported if he testified against [] Defendant and was for the purpose of keeping Nicholas Ramos from testifying against [Defendant].”

B. State’s Evidence

¶ 3 Defendant was tried by jury in Washington County Superior Court from 18 to 19 November 2019. The State’s evidence tended to show the following:

¶ 4 Larry Brooks and Defendant were employed at Crossties Plus as of 29 November 2018. That day, Mr. Brooks and Defendant had an “altercation.” At first, they only exchanged words, but then Defendant pushed Mr. Brooks, and Mr. Brooks swung at Defendant in response, without hitting him. Defendant walked away, and Mr. Brooks went back to work. A few minutes later, Defendant returned with a machete, which he swung at Mr. Brooks multiple times. The machete blade hit Mr. Brooks’ shoulder and left wrist.

¶ 5 Darryl Derstine drove Mr. Brooks to the hospital. Mr. Brooks spent about two hours at the hospital, and then approximately a day and a half at another hospital where he received surgery to repair his severed ligaments. He spent around two months in physical therapy after the incident. He had not regained full use of his left hand when the case was called for trial. Mr. Brooks did not testify as to the monetary amount of his medical expenses, and no evidence in the Record shows the amount.

¶ 6 Nicholas Ramos, another Crossties Plus employee, was working nearby during the alleged assault. Mr. Derstine testified that, “sometime within the next couple of months” after the incident, he had a phone conversation with Defendant concerning Mr. Ramos. Mr. Derstine testified that in the phone call, Defendant

started talking about that he had told his lawyer . . .
that Nick [Ramos] was illegal.

. . .

[Defendant] said he mentioned ICE, like immigration, and implied that they would – might be coming

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around and then . . . he said, “I know Nick has a family here, and that’s too bad.” He said, “I have a family here too, and I’m going to look out for my interest first. I will not have him testify against me.”

[PROSECUTOR:] Did he . . . say anything else about having Nick deported?

[MR. DERSTINE:] He never actually said, “I will have Nick deported.” He contextualized the conversation in that context of immigration in that . . . Nick isn’t supposed to be here in his mind, and then he said, “It’s too bad about his family, but I have a family too. I’m going to look out for my interest first. I will not have him testify against me.”

¶ 7 Similarly, a Crossties Plus employee, James Strite, testified that he “knew [that Defendant] said there is an employee here that is, quote, illegal, and I won’t have him testifying against me.”

¶ 8 Investigator Charles Arnold, who had responded to the call about the incident, testified that he

had went [sic] back to . . . the sawmill on January 29th and spoke with Mr. Derstine in reference to [Defendant] calling up there several times from jail – or calling after he was released from jail and saying that he knew – he knew Nick [Ramos] was here illegally and that it would be a shame if, you know, ICE was called and he was – you know I took it as he deported.

I asked Mr. Derstine if . . . Nick would be willing to talk to me, and he said, “Nick is very scared of [Defendant].”

...

It wasn’t for a while later that I received a message that Nick would talk.

¶ 9 During cross-examination, Investigator Arnold testified the following:

[DEFENSE COUNSEL:] And [Nicholas Ramos’s] cooperation in this case was not deterred in any way that you can tell.

[INVESTIGATOR ARNOLD:] No, ma’am.

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[DEFENSE COUNSEL:] And to your knowledge [Defendant], once he turned himself in, never called ICE or any other deportation agency --

[INVESTIGATOR ARNOLD:] No, ma'am.

...

[DEFENSE COUNSEL:] No letters were seized from [Defendant's] jail cell where he said ICE is going to be here, and to your knowledge no ICE agent is in this courtroom.

[INVESTIGATOR ARNOLD:] No, ma'am.

¶ 10 Mr. Ramos testified that Mr. Derstine had not told him “about a phone call he had with [Defendant.]” Additionally, Mr. Ramos denied that he was, “for lack of a better word[,] . . . scared to come here today and have to testify[.]”

C. Jury Instructions

¶ 11 For the charge of intimidating a witness, the trial court proposed giving jury instructions of

intimidating a witness and the paragraphs within that the defendant intimidated by attempting to deter any person who was summoned or who was acting as a witness in the defendant's case, intimidating means to make timid, fearful, or inspire or affect with fear or frighten and that the threat consisted of threatening to have authorities to deport the witness and then the concluding instructions.

The trial court gave the following jury instructions for the charge of intimidating a witness:

Now the defendant has been charged with intimidating a witness. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt: First, that a person was acting as a witness in a -- in a court of this state; second, that the defendant attempted to deter any person who was acting as a witness in the defendant's case. Intimidating means to make timid or fearful, inspire or affect with fear or frighten; third, that the defendant acted

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intentionally; and, fourth, that the defendant did so by threatening to have the authorities deport the witness.

So if you find from the evidence beyond a reasonable doubt that on or about the alleged date a person was acting as a witness in the defendant's case in a court of this state and that the defendant intentionally attempted to deter the witness by threatening to have the authorities deport the witness it would be your duty to return a verdict of guilty; however, if you do not so find or if you have a reasonable doubt to one or more of these things, it would be your duty to return a verdict of not guilty.

The parties did not object to the court's proposed jury instruction for the charge of intimidating a witness, either before or after the instructions were given.

¶ 12 During deliberations, the jury asked, "What are the criteria for finding an intimidating a witness verdict?" The trial court brought the jury back in the courtroom and repeated essentially the same instructions for the charge of intimidating a witness.

D. Motions to Dismiss

¶ 13 Defendant moved to dismiss both charges at the close of the State's evidence and at the close of all the evidence. The trial court denied Defendant's motions to dismiss.

E. Sentencing and Appeal

¶ 14 The jury found Defendant guilty of both charges. The trial court sentenced Defendant to 45-66 months for the AWDWISI conviction and 22-36 months for the intimidating a witness conviction. At the State's request, the trial court also awarded \$23,189.22 in victim restitution. Defendant timely appealed.

II. Analysis

¶ 15 Defendant argues that (1) there was a fatal variance between the State's proof and its charge of intimidating a witness; (2) the trial court erred by using the phrase "attempted to deter" in its jury instruction for the charge of intimidating a witness; and (3) the trial court's restitution order was unsupported by the State's evidence. We disagree that the variance was fatal and that the jury instructions deviated from the agreed-upon pattern instructions. We agree, and the State concedes, that the trial court's restitution order was unsupported by evidence.

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A. No Fatal Variance

¶ 16 **[1]** Defendant argues that there was a fatal variance between the State's proof and its charge of intimidating a witness. Although there was a variance between the evidence and the indictment, the variance was not fatal.

1. *Preservation*

¶ 17 Defendant's motion to dismiss preserved his variance argument for appellate review. Previously, this Court has held that "[t]o preserve the issue of a fatal variance for review, a defendant must state at trial that a fatal variance is the basis for the motion to dismiss." *State v. Redman*, 224 N.C. App. 363, 367-68, 736 S.E.2d 545, 549 (2012) (citing *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010)). Defendant's motions to dismiss did not specifically articulate a fatal variance argument; the motions were based generally on alleged insufficiencies of evidence. However, our Supreme Court recently clarified that "merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (emphasis in original). "[A] variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009). In accordance with *Golder*, we hold that the issue was preserved. 374 N.C. at 249, 839 S.E.2d at 790.

2. *Standard of Review*

¶ 18 We review *de novo* the issue of a fatal variance. *State v. Cheeks*, 267 N.C. App. 579, 612, 833 S.E.2d 660, 681 (2019), *aff'd*, 377 N.C. 528, 858 S.E.2d 566 (2021).

3. *Analysis*

¶ 19 "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). For a variance to require dismissal, "the defendant must show a fatal variance between the offense charged and the proof as to '[t]he gist of the offense.' This means that the defendant must show a variance regarding an essential element of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (quoting *Waddell*, 279 N.C. at 445, 183 S.E.2d at 646) (citing *State v. Williams*, 295 N.C. 655, 663, 249 S.E.2d 709, 715 (1978)). "The purpose for prohibiting a variance between allegations contained in an indictment and evidence established at trial

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is to enable the defendant to prepare a defense against the crime with which the defendant is charged and to protect the defendant from another prosecution for the same incident.” *State v. Taylor*, 203 N.C. App. 448, 455-56, 691 S.E.2d 755, 762 (2010) (citation omitted).

¶ 20 Here, there was a variance between the indictment and the State’s evidence for the charge of intimidating a witness. The indictment stated that “[t]he intimidation consisted of [Defendant] telling Darryl Derstine to tell Nicholas Ramos that he would have Nicholas Ramos deported if he testified against the Defendant[.]” No evidence tended to show Defendant expressly told Darryl Derstine to convey the message to Nicholas Ramos. Evidence tended to show Nicholas Ramos did not actually receive the message, i.e., Nicholas Ramos testified that Darryl Derstine did not tell him “about a phone call he had with [Defendant.]”

¶ 21 However, the variance here was not fatal because it did not relate to the “the gist” of the offense. “ ‘The gist’ of the offense of intimidating a witness is ‘the obstruction of justice.’ ” *State v. Neely*, 4 N.C. App. 475, 476, 166 S.E.2d 878, 879 (1969). Whether a witness actually receives the threatening communication in question is “irrelevant” to the crime of intimidating a witness. *State v. Barnett*, 245 N.C. App. 101, 108, 784 S.E.2d 188, 193-94, *rev’d in part on other grounds*, 369 N.C. 298, 794 S.E.2d 306 (2016) (reasoning that the fact that the witness and her daughter did not receive the threatening letters was “irrelevant”). The indictment’s reference to Defendant “telling Darryl Derstine to tell Nicholas Ramos” was mere surplusage, and the variance between that reference and the evidence does not merit reversal. *See Pickens*, 346 N.C. at 645-46, 488 S.E.2d at 172 (holding no fatal variance between “handgun” in evidence versus “shotgun” in indictment, because indictment’s averment to a “shotgun” was “not necessary, making it mere surplusage in the indictment”).

B. Jury Instruction

¶ 22 [2] Defendant argues that the trial court erred by using the phrase “attempted to deter”, which he contends was a deviation from the pattern jury instructions, in its jury instruction for the charge of intimidating a witness. We disagree.

1. *Preservation*

¶ 23 Defendant again failed to object at trial to the jury instructions. However, an error in jury instructions is preserved for appellate review, even without objection, “when the trial court deviates from an agreed-upon pattern instruction.” *State v. Lee*, 370 N.C. 671, 672-73, 811 S.E.2d 563, 564-65 (2018).

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2. *Standard of Review*

¶ 24 “Assignments of error challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citing *State v. Ligon*, 332 N.C. 224, 241-242, 420 S.E.2d 136, 146-147 (1992); *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990)).

This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . [I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation omitted).

3. *Analysis*

¶ 25 The trial court’s proposed jury instruction for the charge of intimidating a witness was essentially the same as the pattern instruction N.C.P.I.—Crim. 230.65. In pertinent part, N.C.P.I.—Crim. 230.65 provides the following:

The defendant has been charged with [intimidating] [interfering] with a witness.

For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt:

. . .

that the defendant [[intimidated] [attempted to intimidate] [interfered with] [attempted to interfere with] [deterred] [attempted to deter] [prevented] [attempted to prevent]] any person who was [summoned] [acting] as a witness in the defendant’s case. Intimidate means to make timid or fearful; inspire or affect with fear; frighten.

N.C. Pattern Jury Instructions, N.C.P.I.—Crim. 230.65.

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¶ 26 The trial court did not deviate from the proposed or pattern instruction. Defendant takes issue with the fact that the trial court used the pattern phrase “attempted to deter”, which Defendant argues corresponds to a charge of “interfering with” rather than “intimidating” a witness. However, the trial court specified in its proposal that it would use the phrase “attempting to deter”, and “attempted to deter” is one of the phrases provided in N.C.P.I.—Crim. 230.65. There was no deviation from the agreed-upon instruction.

¶ 27 Although Defendant argues that “intimidating” versus “interfering with” a witness are two different theories of liability with distinct elements, Defendant cites no case law that construes N.C. Gen. Stat. § 14-226 in this way. On the contrary, *State v. Neely*, 4 N.C. App. 475, 166 S.E.2d 878 (1969), which Defendant cites in support of his argument, considers “attempting to intimidate” a witness, “attempting to . . . threaten” a witness, and “attempting to . . . prevent [a witness from] testifying” as undistinguished parts of a single offense under N.C. Gen. Stat. § 14-226. 4 N.C. App. at 476, 166 S.E.2d at 879 (stating that “the defendant was attempting to intimidate and threaten this witness and to prevent him from testifying”). Similarly, *State v. Blevins*, 223 N.C. App. 521, 735 S.E.2d 451 (2012), an unpublished opinion which Defendant likewise cites in support of his argument, states that

The *crime of intimidating a witness* exists when “any person . . . threat[ens], menaces or in any other manner intimidate[s] or attempt[s] to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent[s] or deter[s], or attempt[s] to prevent or deter any person . . . acting as such witness from attendance upon such court[.]”

Id. at ___, 735 S.E.2d at ___ (emphasis added) (quoting N.C. Gen. Stat. § 14-226 (2011)).

¶ 28 Presuming, *arguendo*, the trial court’s use of the phrase “attempted to deter” was an erroneous deviation, Defendant has failed to show that this was likely, in light of the entire charge, to mislead the jury. The jury was informed that “the defendant has been charged with intimidating a witness[,]” and was told that “[i]ntimidating means to make timid or fearful, inspire or affect with fear or frighten[.]” In light of the entire charge, we perceive no reasonable likelihood that the use of the phrase “attempted to deter” (rather than the word “intimidated” or the phrase “attempted to intimidate”) misled the jury. It was already informed

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that the charge involved intimidation and was provided a definition of “intimidating”.

C. The Restitution Order

¶ 29 [3] Defendant argues that the State did not present any evidence to support the amount of the trial court’s restitution order. We agree.

1. *Preservation*

¶ 30 Although Defendant did not object to the restitution award at sentencing, an invalid or incorrect sentence may be appealed as a matter of law. *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (applying N.C. Gen § 15A-1446(d)(18)).

2. *Standard of Review*

¶ 31 We review *de novo* whether competent evidence supports the trial court’s restitution award. *State v. Lucas*, 234 N.C. App. 247, 258, 758 S.E.2d 672, 680 (2014).

3. *Analysis*

¶ 32 The trial court ordered Defendant to pay restitution in the amount of \$23,189.22 to the victim. However, the State failed to present in court any documentation or testimony supporting or detailing the amount of the victim’s medical expenses. The State concedes this point on appeal.

¶ 33 When a restitution award lacks a sufficient evidentiary basis, “the proper remedy is to vacate the trial court’s restitution order and remand for rehearing on the issue.” *State v. Thomas*, 259 N.C. App. 198, 211, 814 S.E.2d 835, 843 (2018) (citation and quotation marks omitted), *disc. review denied*, 371 N.C. 475, 818 S.E.2d 288 (2018). We vacate the restitution order and remand for a rehearing on the issue.

III. Conclusion

¶ 34 For the foregoing reasons, we discern no error in the denial of the motion to dismiss and in the jury instruction. We vacate the trial court’s restitution order and remand for a rehearing on that issue alone.

NO ERROR IN PART; VACATED IN PART, AND REMANDED.

Judges TYSON and CARPENTER concur.

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STATE OF NORTH CAROLINA

v.

WILLIAM ANTHONY FRANCE, DEFENDANT

No. COA20-487

Filed 21 September 2021

1. Search and Seizure—traffic stop—duration—officer safety measures—reasonable suspicion of other crimes

Defendant's motion to suppress drugs and paraphernalia was properly denied where, although his vehicle was initially stopped for a broken taillight, the stop was not unconstitutionally prolonged because the officers diligently pursued investigation into the reason for the stop, conducted ordinary inquiries including license and warrant checks, and took necessary safety precautions after one passenger who was found to have active warrants stated he had a gun on his person. Moreover, there was reasonable suspicion of criminal activity where one officer had observed the same vehicle earlier in the night involved with a hand-to-hand transaction, which justified a canine sniff for narcotics. Challenged findings were either irrelevant to the ultimate question of whether the stop was unreasonably prolonged or supported by evidence.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

The trial court's order requiring defendant to pay attorney fees after he pleaded guilty to multiple drug offenses was vacated and the matter remanded for further proceedings where the court did not personally ask defendant if he wanted to be heard on the issue of attorney fees.

Appeal by Defendant from judgments entered 8 October 2019 by Judge William A. Wood II in Forsyth County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Ellis & Winters LLP, by Michelle A. Liguori, for Defendant-Appellant.

GRIFFIN, Judge.

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¶ 1 Defendant William Anthony France appeals from judgments entered upon his pleas of guilty to various drug-related offenses, driving while license revoked, and attaining the status of a habitual felon. Defendant argues that the trial court erred by (1) denying his motion to suppress evidence; and (2) entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. After careful review, we conclude that the trial court did not err in denying Defendant's motion to suppress evidence. We vacate the civil judgment as to attorney's fees and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 On the night of 15 February 2017, Detective L.A. Veal and Officer LaValley of the Winston-Salem Police Department were patrolling the streets of Winston-Salem in an unmarked vehicle as part of the "street crimes unit" when they noticed a vehicle with "a white light emitting from the taillight[.]" Detective Veal turned on her vehicle's emergency lights and initiated a traffic stop because of the broken taillight.

¶ 3 After stopping the vehicle, Detective Veal and Officer LaValley approached the vehicle. Defendant was in the driver's seat of the vehicle. His brother, Harvey France, was in the passenger's seat. Defendant's cousin, Antoine Bishop, was in the back seat. Officer LaValley then informed Defendant and the passengers of the purpose of the traffic stop and requested identification from the occupants, while Detective Veal called in the vehicle's license plate number and peered into the front and back seats of the vehicle with a flashlight. Defendant informed Officer LaValley that he did not have his driver's license. After Officer LaValley collected Harvey's identification, Harvey stated, "I can walk home. . . . I'm just saying I can walk." Officer LaValley then returned to the patrol car with the occupants' identification to conduct warrant checks. Detective Veal briefly discussed the white taillight with Defendant before joining Officer LaValley in the patrol car.

¶ 4 Detective Veal returned to the patrol car and requested that a canine unit respond to her location. Immediately thereafter, Officers Ferguson and Wagoner arrived at the scene. Detective Veal briefly greeted the officers before returning to the patrol car with Officer LaValley. Officers Ferguson and Wagoner then stood by the stopped vehicle to watch over the occupants.

¶ 5 Shortly after Detective Veal returned to the patrol car, Officer LaValley discovered that the backseat passenger, Mr. Bishop, had active warrants for his arrest. Officer LaValley exited the patrol car and, with assistance from Officer Wagoner, asked Mr. Bishop to step out of the

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vehicle. Mr. Bishop complied and informed Officer LaValley that he was carrying a gun. Officer LaValley then removed the gun from Mr. Bishop's possession and placed it on the trunk of the vehicle while Officer Ferguson watched Mr. Bishop from the opposite side of the car with his weapon drawn.

¶ 6 Meanwhile, Detective Veal approached the driver's side of the vehicle and asked Defendant and Harvey to place their hands on the dashboard while Officers LaValley, Wagoner, and Ferguson dealt with Mr. Bishop. After Officer LaValley placed Mr. Bishop's gun on the trunk, Officer Ferguson informed Detective Veal that he was going to step away to "render [Mr. Bishop's weapon] safe." While Officer Ferguson was securing Mr. Bishop's weapon and Officers LaValley and Wagoner were placing Defendant under arrest, Detective Veal stood watch over Defendant and Harvey.

¶ 7 Officer Ferguson unloaded Mr. Bishop's weapon and stored it in the trunk of the patrol car. He then returned to the vehicle and told Detective Veal that he would watch Defendant and Harvey so that Detective Veal could go and "do what [she needed] to do." Detective Veal immediately returned to her patrol car, pulled out her laptop, and continued to conduct warrant checks on Defendant and/or Harvey. After conducting the warrant checks, Detective Veal began "the process of issuing a citation" to Defendant for the broken taillight and "driving with a license revoked[.]"

¶ 8 While Detective Veal was drafting the citation, the canine unit that she requested earlier responded to the scene, at which point the other officers requested that Defendant and Harvey step out of the vehicle. Defendant and Harvey complied with the officers' requests. While the other officers dealt with Defendant and Harvey, Detective Veal walked over to greet the officer with the canine and informed the officer that she had previously encountered the vehicle that evening and witnessed "a hand-to-hand transaction." The officer with the canine then walked the canine around the vehicle, and the canine "indicated a positive alert." The officers then searched the vehicle and found "multiple burnt marijuana cigarettes were located in a portable ashtray in the center console" along with "an open container of beer[.]" Officer Ferguson also searched Defendant's person and "located a digital scale in [Defendant's] pants pocket."

¶ 9 Detective Veal arrested Defendant for possession of drug paraphernalia. Detective Veal and Officer Ferguson both reported smelling "unburnt marijuana" emanating from Defendant's person. Officers Ferguson

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and Wagoner later conducted a strip search of Defendant at the police station and “located an individually wrapped bag of unburnt marijuana and an individually wrapped bag of a white rock-like substance,” which later “tested positive for cocaine.”

¶ 10 A Forsyth County grand jury issued true bills of indictment charging Defendant with several drug-related offenses, driving while license revoked, and attaining the status of a habitual felon. Defendant then filed a motion to suppress evidence obtained during the traffic stop. A hearing was held on Defendant’s motion to suppress, during which Defendant argued, *inter alia*, that the length of the traffic stop was “outside the reasonable amount of time . . . allowed for a traffic stop” under the Fourth Amendment of the U.S. Constitution as interpreted in *United States v. Rodriguez*, 575 U.S. 348 (2015).

¶ 11 The trial court entered a written order denying Defendant’s motion to suppress and concluded the following as a matter of law:

The officers in this case diligently pursued their investigation into the original [traffic] violation for which [] Defendant’s vehicle was stopped and the related safety concerns. The seizure of [] Defendant in this case was reasonable in every way and in compliance with the law in *Rodriguez* and other cases. . . . To the extent, if any, that the seizure of [] Defendant went beyond the scope of the investigation that resulted from the original traffic violation, that seizure was supported by reasonable suspicion or safety concerns independent of the traffic violation, i.e., dealing with the safety concerns which arose when Officer LaValley, not lead traffic violation investigator Det. Veal, took the back seat passenger of the [vehicle] into custody for outstanding warrants and dealing with safety concerns that arose when a loaded handgun was located by Officer LaValley on that individual. Both of these situations required Det. Veal to deviate, if only briefly, from her mission of conducting the traffic stop as it related to [] Defendant’s traffic and license violations.

The trial court further concluded that the body camera footage “introduced and published during th[e] hearing corroborate[d] the fact that Det. Veal diligently pursued her investigation into the original traffic violation for which the vehicle was stopped and subsequent discovery of [] Defendant’s revoked license.”

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¶ 12 Pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), Defendant pled guilty to possession of a controlled substance on jail premises, possession with intent to sell or deliver cocaine, two counts of possession of cocaine, possession of drug paraphernalia, possession of less than one-half ounce of marijuana, and attaining the status of a habitual felon. The trial court entered two judgments upon Defendant's convictions and sentenced him to 26 to 44 months' imprisonment for possession of cocaine and possession of drug paraphernalia and 67 to 93 months' imprisonment for the other offenses. The court also entered a civil judgment ordering Defendant to pay attorney's fees.

¶ 13 Defendant expressly reserved his right to appeal the trial court's order denying his motion to suppress and provided oral notice of appeal in open court. Defendant did not provide notice of appeal from the civil judgment ordering him to pay attorney's fees but has filed a petition for writ of certiorari seeking discretionary review of the judgment.

II. Appellate Jurisdiction

¶ 14 We must first address our jurisdiction to hear Defendant's appeal on the issue of attorney's fees. Defendant concedes that he did not timely file notice of appeal from the civil judgment ordering him to pay attorney's fees. In acknowledgment of this error, Defendant filed a petition for certiorari with this Court seeking discretionary review of his appeal.

¶ 15 N.C. R. App. P. 21(a) provides that this Court may issue a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action. . . ." N.C. R. App. P. 21(a)(1). "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). This Court has previously allowed petitions for writ of certiorari in cases where the trial court entered a civil judgment ordering the defendant to pay attorney's fees without providing the defendant notice and an opportunity to be heard. *See, e.g., State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018); *State v. Baker*, 260 N.C. App. 237, 240–41, 817 S.E.2d 907, 909–10 (2018). We therefore grant Defendant's petition seeking our discretionary review on the issue of attorney's fees.

III. Analysis

¶ 16 Defendant argues that the trial court erred by (1) denying his motion to suppress evidence; and (2) entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. We affirm the trial court's order denying

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Defendant's motion to suppress evidence. We vacate the civil judgment as to attorney's fees and remand for further proceedings.

A. Motion to Suppress

¶ 17 [1] Defendant argues that the trial court erred in denying Defendant's motion to suppress, because the officers prolonged the duration of the traffic stop to conduct a search for drugs in violation of Defendant's rights under the Fourth Amendment of the United States Constitution as interpreted in *United States v. Rodriguez*, 575 U.S. 348 (2015). Specifically, Defendant contends that the trial court "erroneously concluded that Detective Veal diligently conducted the traffic stop, that reasonable suspicion existed to prolong the stop, and that Mr. Bishop's outstanding warrants and firearm provided a reasonable basis for delay." We disagree.

¶ 18 Our review of a trial court order denying a motion to suppress evidence "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

¶ 19 The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "A traffic stop is a seizure" within the meaning of the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

¶ 20 While "[a] seizure for a traffic violation justifies a police investigation of that violation," *Rodriguez*, 575 U.S. at 354, "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose before that mission was completed," *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (citing *Rodriguez*, 575 U.S. at 349, 353–55). "Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop." *Rodriguez*, 575 U.S. at 355 (alteration in original) (citation and internal quotation marks omitted). Such inquiries may "involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citation omitted).

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¶ 21 In addition, “[t]he Fourth Amendment permits an officer to conduct an investigation *unrelated* to the reasons for the traffic stop as long as it ‘[does] not lengthen the roadside detention.’ ” *United States v. Bowman*, 884 F.3d 200, 210 (4th Cir. 2018) (quoting *Rodriguez*, 575 U.S. at 354) (alteration in original); *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (“An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” (citation omitted)). “For example, an officer may question the occupants of a car on unrelated topics without impermissibly expanding the scope of a traffic stop” or “engage a K-9 unit to conduct a ‘dog sniff’ around a vehicle during a lawful traffic stop in an attempt to identify potential narcotics.” *United States v. Hill*, 852 F.3d 377, 382 (4th Cir. 2017) (citing *Johnson*, 555 U.S. at 333; *United States v. Caballes*, 543 U.S. 405, 407–09 (2005)).

¶ 22 “Traffic stops are especially fraught with danger to police officers, so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely.” *Rodriguez*, 575 U.S. at 356 (citation and internal quotation marks omitted). “[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission.” *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676. As a safety precaution, “a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle,” along with any passengers. *Maryland v. Wilson*, 519 U.S. 408, 410, 414–15 (1997) (stating that “danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car”). “Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop.” *Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 (citation omitted). “But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop.” *Id.* (citation omitted).

¶ 23 In the instant case, Detective Veal initiated a traffic stop of Defendant’s vehicle because of the vehicle’s broken taillight—a “traffic violation justif[ying] a police investigation of that violation.” *Rodriguez*, 575 U.S. at 354. At that point, Detective Veal was legally authorized to detain Defendant for “the length of time . . . reasonably necessary to accomplish the mission of the stop,” which was to address the broken taillight. *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (citation omitted).

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Upon approaching the vehicle, Officer LaValley requested identification from the occupants and informed them of the reason for the stop, while Detective Veal shined her flashlight into the vehicle and called in the vehicle's license plate number. Officer LaValley then returned to the patrol car with the occupants' identification to conduct warrant checks. After briefly engaging with Defendant regarding his taillight, Detective Veal joined Officer LaValley in the patrol car. Such inquiries being "ordinary inquiries incident to [a traffic] stop," *Rodriguez*, 575 U.S. at 355 (alteration in original) (citation omitted), the officers' actions were well-within the scope of the mission of the stop.

¶ 24 After joining Officer LaValley in the patrol car, Detective Veal requested that a canine unit respond to her location, while Officer LaValley conducted warrant checks on the occupants. Although unrelated to the traffic mission of the stop, Detective Veal's request to "engage a K-9 unit to conduct a 'dog sniff' around [the] vehicle[.]" *Hill*, 852 F.3d at 382 (citation omitted), did "not measurably extend the duration of the stop" and "convert the encounter into something other than a lawful seizure," *Johnson*, 555 U.S. at 333; see also *Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 ("[I]nvestigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop." (citation omitted)).

¶ 25 Immediately after Officer Veal requested the canine unit, Officers Ferguson and Wagoner arrived at the scene. Detective Veal briefly greeted the officers before rejoining Officer LaValley in the patrol car. Officer LaValley then discovered that Mr. Bishop had active warrants for his arrest and proceeded to place Mr. Bishop under arrest with assistance from Officer Wagoner. Mr. Bishop complied and informed Officer LaValley that he had a gun on his person. At this point, the situation required the officers to take certain safety "precautions in order to complete [the] mission safely." *Rodriguez*, 575 U.S. at 356 (citation omitted).

¶ 26 After Mr. Bishop informed Officer LaValley that he had a gun, Officer LaValley removed the weapon from Mr. Bishop's possession and placed it on the trunk of the vehicle. Meanwhile, Officer Wagoner stood watch on the passenger's side of the car while Officer Ferguson watched Mr. Bishop from the opposite side of the car with his weapon drawn. While the three other officers were occupied with disarming and arresting Mr. Bishop, Detective Veal ordered Defendant and Harvey to place their hands on the dashboard and stood watch over them. After Officer LaValley placed Mr. Bishop's weapon on the trunk, Officer Ferguson informed Detective Veal that he was going to step away to "render [Mr.

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Bishop's weapon] safe." Officer Ferguson then unloaded Mr. Bishop's weapon and stored it in the trunk of the patrol car.

¶ 27 "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676. The officers moved diligently and responsibly upon discovery of the loaded pistol. The presence of multiple officers only increased the safety and efficiency of the traffic stop. *See Wilson*, 519 U.S. at 414–15 (stating that "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car"). Accordingly, all of the officers were taking legitimate and permissible steps necessary to ensure their safety. *See Rodriguez*, 575 U.S. at 356.

¶ 28 After securing Mr. Bishop's weapon, Officer Ferguson returned to the vehicle and told Detective Veal that he would watch Defendant and Harvey so that Detective Veal could go and "do what [she needed] to do." Detective Veal immediately returned to her patrol car to conduct warrant checks on Defendant and/or Harvey and began "the process of issuing a citation" to Defendant for the broken taillight and "driving with a license revoked[.]"

¶ 29 While Detective Veal was drafting citations, the canine unit that she requested earlier responded to the scene. The other officers then requested that Defendant and Harvey step out of the vehicle. While the other officers dealt with Defendant and Harvey, Detective Veal walked over to greet the officer with the canine. The officer with the canine then walked the canine around the vehicle, and the canine "indicated a positive alert."

¶ 30 At no point during the preceding course of events did the officers' actions "convert the encounter into something other than a lawful seizure." *Johnson*, 555 U.S. at 333. The facts in the Record indicate that at each point during the traffic stop Detective Veal was either "diligently pursu[ing] [the] investigation[.]" conducting "ordinary inquiries incident to [the traffic] stop[.]" or taking necessary "precautions in order to complete h[er] mission safely." *Rodriguez*, 575 U.S. at 354–56 (citations omitted). Although the request for a canine sniff was "unrelated to the reasons for the traffic stop[.]" *Bowman*, 884 F.3d at 210 (citing *Rodriguez*, 575 U.S. at 354) (alteration omitted), the request did "not measurably extend the duration of the stop" and was therefore permissible, *Johnson*, 555 U.S. at 333.

¶ 31 Assuming *arguendo* that any of the officers' actions did unreasonably extend the duration of the stop, we agree with the trial court that the

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actions were justified by reasonable suspicion of criminal activity. The trial court's findings of fact state that "[t]he traffic stop was recorded on Body Worn Camera . . . and the footage was admitted as State's Exhibit 1." A review of that footage shows that when Detective Veal walked over to greet the officer with the canine, she informed the officer that she had previously encountered Defendant's vehicle that evening and witnessed "a hand-to-hand transaction." The traffic stop also occurred late in the evening and in a high crime area. Mr. Bishop had multiple active warrants for his arrest and a loaded gun on his person. Moreover, after Officer LaValley collected Harvey's identification, Harvey stated, "I can walk home. . . . I'm just saying I can walk." Although each of these factors standing alone might not provide officers with reasonable suspicion, the totality of the circumstances indicate that reasonable suspicion justified prolonging the stop. *See State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012) ("The only requirement [for reasonable suspicion] is a minimal level of objective justification, something more than an unprioritized suspicion or hunch." (citations and internal marks omitted)).

¶ 32 Lastly, Defendant takes issue with several findings of fact made by the trial court. Defendant contends that the trial court mistakenly determined that (1) "after Detective Veal approached the stopped car, she asked [Defendant] for his license;" (2) Detective Veal requested the canine unit after running warrant checks on the occupants; (3) "it takes approximately five minutes to conduct a single warrant check;" (4) "Detective Veal stood outside the driver's side window with [Defendant] as a safety precaution and she intended to return to her patrol vehicle to write [Defendant] citations once another officer relieved her and could assume security watch over [Defendant] and his brother;" and (5) [Defendant] freely volunteered his consent for the officers to search the car" and conduct a "canine sniff."

¶ 33 Even assuming that contentions (1)-(3) have merit, none of the facts Defendant challenges alter the legal analysis in this case. It is irrelevant whether Detective Veal asked for Defendant's license or not, whether Detective Veal requested the canine unit before or after conducting the warrant checks, or whether it takes five minutes or less, on average, to conduct a warrant check.

¶ 34 We also disagree that the trial court erroneously determined that Detective Veal watched over Defendant and Harvey until another officer could relieve her. The body camera evidence clearly shows that while the other three officers were arresting Mr. Bishop and securing his weapon, Detective Veal was the only officer available to watch over Defendant and Harvey. Officer safety thus required Detective Veal to

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watch over Defendant and Harvey while the other officers dealt with Mr. Bishop. “[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission.” *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676.

¶ 35 Lastly, it is irrelevant whether Defendant consented to a search or canine sniff of his vehicle. At the time the canine officer arrived and conducted the canine sniff, Detective Veal was still in the process of issuing a citation to Defendant. Although the officers requested that Defendant and Harvey step out of the vehicle before the canine sniff, “a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle,” along with any passengers. *Wilson*, 519 U.S. at 410. When the canine officer conducted the drug sniff around Defendant’s vehicle, the canine “indicated a positive alert.” At that point, the officers were authorized to conduct a search of Defendant’s vehicle for narcotics, regardless of whether Defendant consented to the search or not.

¶ 36 We therefore affirm the trial court’s denial of Defendant’s motion to suppress.

B. Attorney’s Fees

¶ 37 [2] Defendant argues that the trial court erred by entering a civil judgment ordering Defendant to pay attorney’s fees without providing Defendant notice and an opportunity to be heard. We agree, vacate the civil judgment as to attorney’s fees, and remand for further proceedings.

¶ 38 N.C. Gen. Stat. § 7A-455(b) provides that a court may enter a civil judgment against a convicted indigent defendant “for the money value of services rendered by assigned counsel, . . . plus any sums allowed for other necessary expenses of representing the indigent person[.]” N.C. Gen. Stat. § 7A-455(b) (2019). However, “[b]efore imposing a judgment for . . . attorney’s fees, the trial court must afford the defendant notice and an opportunity to be heard.” *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906 (citations omitted). To that end, “before entering money judgments against indigent defendants for fees . . . under N.C. Gen. Stat. § 7A-455, trial courts should ask [the] defendants—personally, not through counsel—whether they wish to be heard on the issue.” *Id.* at 523, 809 S.E.2d at 907. “Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.” *Id.*

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¶ 39 After the plea hearing concluded, the following colloquy took place between the trial court and Defendant's counsel:

THE COURT: All right. Thank you, [defense counsel].
How much time?

[COUNSEL]: Your Honor, at this—at the conclusion of this hearing, I'll have approximately 40 hours. I would say 40 hours. . . .

THE COURT: That's the D rate? That's –

[COUNSEL]: Seventy-five times 40, is [\$]3000.

THE COURT: Yes, sir. All right. [Defendant], sir if you'll stand up.

The trial court then proceeded to sentence Defendant and, with respect to attorney's fees, stated, "All of the costs associated with this court action will be [included in] a civil judgment. That would include the court costs, attorney's fee of \$3000 and a lab fee of \$1800."

¶ 40 At no point did the trial court ask Defendant "personally, not through counsel[,] whether [he] wish[ed] to be heard on the issue" of attorney's fees. *Id.* Moreover, there is no "evidence in the record demonstrating that . . . [D]efendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* We therefore vacate the civil judgment ordering Defendant to pay attorney's fees and remand for further proceedings.

IV. Conclusion

¶ 41 We affirm the trial court's denial of Defendant's motion to suppress. We vacate the civil judgment as to attorney's fees and remand for further proceedings.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges MURPHY and HAMPSON concur.

STATE v. GOINS

[279 N.C. App. 448, 2021-NCCOA-499]

STATE OF NORTH CAROLINA

v.

BRANDON SCOTT GOINS, DEFENDANT

No. COA19-288-2

Filed 21 September 2021

Appeal and Error—remand from Supreme Court—higher court’s interpretation of evidence—same or less taxing standard

On remand from the Supreme Court to consider the remaining issues in defendant’s appeal—whether the trial court committed plain error in allowing certain testimony and in its jury instructions—the Court of Appeals held that, assuming *arguendo* the trial court erred, the alleged errors did not amount to plain error because the Supreme Court, in its opinion considering a different argument raised by defendant, evaluated the strength of the evidence in the case while applying a less taxing standard of review and concluded that, in light of the virtually uncontested evidence of defendant’s guilt (not relying upon the evidence that defendant challenged in the case before the Court of Appeals), defendant could not meet his burden.

Appeal by Defendant from judgments entered 21 September 2018 by Judge Christopher W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 5 December 2019, and opinion filed 4 February 2020. Remanded to this Court by the North Carolina Supreme Court on 11 June 2021 by 2021-NCSC-65 for consideration of Defendant’s remaining arguments on appeal.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine F. Jordan, for the State.

Joseph P. Lattimore for defendant-appellant.

MURPHY, Judge.

¶ 1 This case returns to this Court after our Supreme Court reversed the opinion in *State v. Goins*, 269 N.C. App. 618, 839 S.E.2d 858 (2020), and remanded the matter to our Court “to address the remaining issues raised by [D]efendant on appeal.” *State v. Goins*, 2021-NCSC-65, ¶ 20.

¶ 2 The remaining issues presented by Defendant’s appeal are as follows: (1) “Did the trial court commit plain error in permitting Lieutenant

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Smith to interpret video footage of the incident to ‘corroborate’ witness testimony and comment on [Defendant’s] guilt?”; and (2)

Did the trial court commit plain error by failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter where the video evidence created a conflict about who fired first and thereby produced the requisite evidence to show [Defendant] fired his gun in the heat of blood upon adequate provocation?

¶ 3 Assuming, *arguendo*, that the trial court’s alleged failures to act were in error, Defendant cannot demonstrate any alleged error rose to the level of plain error. Our Supreme Court has established what a defendant must demonstrate in order for a trial court’s error to rise to the level of plain error:

[T]o demonstrate that a trial court committed plain error, the defendant must show that a fundamental error occurred at trial. To show fundamental error, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Further, . . . because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Maddux, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (marks and citations omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)).

¶ 4 In *State v. Lawrence*, our Supreme Court had reaffirmed the legal principles applicable to plain error review and concluded that the defendant failed to meet his burden of demonstrating such error. *State v. Lawrence*, 365 N.C. 506, 518-19, 723 S.E.2d 326, 334-35 (2012).

Specifically, [in *Lawrence*, our Supreme Court] held that the trial court’s instruction on conspiracy to commit robbery with a dangerous weapon was erroneous; however, [it] determined that the error was not plain error, because in light of the overwhelming and uncontroverted evidence, [the] defendant cannot show that, absent the error, the jury probably would have returned a different verdict.

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Maddux, 371 N.C. at 564-65, 819 S.E.2d at 371 (marks omitted). In accordance with *Lawrence*, for us to find prejudice to a defendant under plain error review “[the] [d]efendant must demonstrate that absent the error, the jury probably would have reached a different result.” *Id.* at 565, 819 S.E.2d at 371-72 (marks omitted).

¶ 5 Our Supreme Court has already examined and evaluated the strength of the evidence in this case:

We also examine the evidence presented to the jury. The State presented evidence that [D]efendant was violating his probation and would rather kill himself or be killed by the police than go back to jail. Several witnesses testified that [D]efendant’s gun was loaded with bullets designed to cause more serious injuries, which are colloquially referred to as “cop-killers.” The State’s witnesses also testified that when [D]efendant was eventually located by police, he pointed his gun directly at a police officer in the midst of the pursuit. Furthermore, after Detective Hinton clearly identified himself as a police officer, [D]efendant turned around, drew his weapon, and fired at the officer. Multiple witnesses testified that [D]efendant shot first and that Detective Hinton only returned fire after [D]efendant’s first shot. In addition, the hotel surveillance video which was played for the jury at trial showed the shootout between [D]efendant and Detective Hinton. *Between the video and the testimony of eyewitnesses who corroborated the State’s account of events, “virtually uncontested” evidence of [D]efendant’s guilt was submitted to the jury for its consideration.*

....

Therefore, we cannot conclude that [D]efendant has met his burden of showing that “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached” at trial. N.C.G.S. § 15A-1443 (2019).

Goins, 2021-NCSC-65 at ¶¶ 15, 19 (emphasis added).

¶ 6 In making this determination, our Supreme Court did not rely upon the contested evidence Defendant mentions in the first remaining issue,

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namely the testimony from Lieutenant Smith interpreting video footage of the incident in order to “corroborate” witness testimony. Furthermore, our Supreme Court arrived at this view of the evidence and its impact on the verdict while applying a less taxing standard of “reasonable *possibility*” compared to the “reasonable *probability*” of a different result that must be shown to amount to plain error. *Id.* at ¶ 19.

¶ 7 In light of our Supreme Court’s interpretation of the evidence presented at trial, any alleged error does not rise to the level of plain error in the face of “ ‘virtually uncontested’ evidence of [D]efendant’s guilt[.]” *Id.* at ¶ 15. To arrive at a different result and view of the evidence presented would create a paradox in which we could collaterally undermine the analysis of our Supreme Court. It is axiomatic that when our Supreme Court, applying the same or a less taxing standard of review, has already determined and relied upon the impact of unchallenged evidence, we cannot take a different view of the evidence presented or the impact thereof. Defendant has failed to show that any alleged error rose to the level of plain error.

NO PLAIN ERROR.

Judges TYSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
IVAN GERREN HOOPER

No. COA20-200

Filed 21 September 2021

**Appeal and Error—criminal case—request for jury instruction—
self-defense—invited error—waiver of appellate review**

In a prosecution for assault on a female and other charges arising from an altercation between defendant and his child’s mother, the trial court did not err by denying defendant’s request for a jury instruction on self-defense—which he made right before the court was about to instruct the jury—where defendant failed to file a pre-trial notice to assert self-defense (as required under N.C.G.S. § 15A-905(c)(1)) and expressly agreed to the court’s instructions both before and after they were given. Rather, defendant’s failure to object to the tendered instructions constituted invited error that

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waived his right to appellate review, including plain error review. Furthermore, given the overwhelming evidence of his guilt, defendant could not show that his denied request had prejudiced him.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 7 March 2018 by Judge Stanley L. Allen in Rockingham County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jasmine C. McGhee, for the State.

Carella Legal Services, PLLC, by John F. Carella, for defendant-appellant.

TYSON, Judge.

¶ 1 Ivan Gerren Hooper (“Defendant”) appeals from a judgment entered upon a jury’s verdicts finding him guilty of assault by strangulation, communicating threats, assault on a female, interfering with emergency communication, and attaining habitual felon status. We find no error.

I. Background

¶ 2 On 5 March 2017, Reidsville Police Officer Scott Brown responded to a call placed by Ashley Thomas concerning an alleged assault, which had occurred at a Quality Inn Hotel the previous evening. Officer Brown met Thomas at her residence located on Wolf Island Road. Thomas stated she had an altercation with Defendant, the father of her child. Evidence tended to show Thomas arrived with their son, Trent, at Defendant’s hotel room at the Quality Inn on 4 March 2017. Following the altercation in the hotel room, Defendant had been shot. Thomas was visibly bruised and swollen across the bridge of her nose and eyes and displayed redness around her neck. Thomas also showed an open wound on her cheek, and scratches down her chest.

¶ 3 Defendant was indicted for assault by strangulation, possession of a firearm by felon, communicating threats, assault on a female, interfering with an emergency communication, and subsequently, with attaining the status of a habitual felon. Defendant failed to file a pre-trial notice to assert self-defense. *See* N.C. Gen. Stat. § 15A-905(c)(1) (2019).

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¶ 4 Thomas testified to her version of the events that unfolded at Defendant's hotel room. Thomas testified when she arrived at Defendant's hotel room with their son for visitation, Defendant began questioning Thomas regarding her personal relationship status. Defendant became agitated, punched, kneed, and threatened Thomas' life. Thomas then kneed Defendant, which allowed Thomas to get up and retrieve her phone just before Defendant shattered it. Thomas turned to the TV stand, picked up [Defendant's] gun, and discharged the gun towards the floor.

¶ 5 Defendant did not testify at trial. Reidsville Police Officer Jason Joyce, a witness for the State, testified about what Defendant had told him on 5 March 2017. Defendant told Officer Joyce he had advanced toward Thomas after he saw her with the firearm.

¶ 6 Defendant's mother, Felicia Donnell, testified for Defendant regarding a phone call she had with Thomas shortly after the events had occurred in the hotel room. Donnell testified she was told no physical altercation had occurred until after the first shot was fired. Further testimony by other defense witnesses showed Thomas had acquired a gun prior to her visit to Defendant's hotel room.

¶ 7 At the close of the State's case and again at the close of all evidence, Defendant moved to dismiss for insufficiency of the evidence. Defense counsel argued Thomas had "provoked this particular action" and that it was a "defense mechanism" and that "he had to try to protect himself." Both motions were denied. During the initial charge conference, the trial court presented and laid out the proposed jury instructions. Defendant did not request additional instructions or raise objections to the instructions the court intended to give. Counsel expressly agreed to the court's tendered instructions.

¶ 8 The following day, immediately before the jury instructions were to be delivered, Defendant requested, for the first time, the jury be instructed on self-defense using the pattern jury instruction, entitled "Self-Defense-Assaults Not Involving Deadly Force." N.C.P.I. – Crim. 308.40 (2017). The State objected.

¶ 9 The trial court denied Defendant's request, stating "there was no notice given of [an] affirmative defense." The court further pointed out there was no evidence of what Defendant thought or believed about the need to defend himself and "there [was] no other evidence that . . . anything was done in self-defense." After instructing the jury, the trial court again asked both the State and Defendant if there were any objections to the jury instructions. Both parties replied they had no objections to the instructions as given.

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¶ 10 The jury found Defendant not guilty of possession of a firearm by a felon, but guilty of assault by strangulation, communicating threats, assault on a female, interfering with emergency communication, and having attained habitual felon status. Defendant's convictions were consolidated, and he was sentenced to an active prison term of 65 to 90 months.

II. Jurisdiction

¶ 11 Defendant failed to give timely notice of appeal. Defendant's petition for writ of certiorari was allowed by this Court 27 August 2019 to review the judgment entered 7 March 2018. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-1444(g) (2019) and N.C. R. App. P. 21(a)(1).

III. Issue

¶ 12 Defendant argues the trial court erred by denying his request for an instruction on self-defense.

IV. Self-Defense Instruction

¶ 13 Defendant failed to file the statutorily required notice of intention to offer a defense of self-defense at trial. *See* N.C. Gen. Stat. § 15A-905(cv)(1) ("Give notice to the State of the intent to offer at trial a defense of . . . self-defense"). Defendant asserts sufficient evidence was presented to justify the trial court instructing the jury on self-defense.

¶ 14 During the jury charge conference, the trial court stated it was going to give:

the usual [instructions]: function of the jury, burden of proof, and reasonable doubt, credibility of witnesses, weight of the evidence, effect of the Defendant's decision not to testify.

I had to pull it in from a civil volume, but it's 101.41, that's stipulations; 104.05, circumstantial evidence; 104.41, actual versus constructive possession; 104.50, be the photographs and the other things as illustrative evidence; 105.20, impeachment or corroboration by a prior statement; 105.35, impeachment of a witness, other than the Defendant by proof of a crime; 120.10, definition of intent.

And then, the substantive offenses, 208.61, assault inflicting physical injury by strangulation; 254A.11, possession of a firearm, it wouldn't be a weapon of mass destruction by a felon; 208.70, assault on a

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female by a male person; 235.18, communicating threats; and 222.32, interfering with emergency communications; and then the final mandate.

The trial court then asked of both the State and Defendant's trial counsel: "Are there any requests for additional instructions or any objections to the instructions the Court is intending to give[?]" Defendant's counsel responded, "Your Honor, I believe that the information that's been articulate (sic) is accurate."

¶ 15 During the jury charge conference, Defendant's counsel never made additional requests, nor voiced any objection regarding the jury instructions proposed after he was specifically asked by the trial court. Defendant was provided the opportunity to object or correct these instructions and expressly agreed to the instructions to be given.

¶ 16 The day after the jury charge conference, just before jury deliberations, Defendant's counsel mentioned self-defense for the first time and made the request for a self-defense instruction. The trial court recalled Defendant's express agreement to the proffered instructions from the day prior, stating: "Well, you said yesterday you were satisfied with the instructions as the Court had outlined is going (sic) to give."

¶ 17 After delivering the instructions to the jury, the trial court held the following colloquy:

THE COURT: Now outside the presence of the jury, are there any requests for additional instructions or for corrections or any objections to the instructions given to the jury by— from the State?

[THE STATE]: No, Your Honor.

THE COURT: Or from the Defendant?

[DEFENDANT'S COUNSEL]: No, Your Honor.

¶ 18 Defendant's failure to object during the charge conference or after the instructions were given to the jury, along with his express agreement during the charge conference and after the instructions were given to the jury, constitutes invited error. His invited error waives any right to appellate review concerning the invited error, "*including plain error review.*" *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (emphasis supplied).

¶ 19 Our Supreme Court in *State v. White* examined a defendant's counsel's involvement in jury instructions in a death penalty case. *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998). The Court held:

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Counsel . . . did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. at 570, 508 S.E.2d at 275 (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)). The tardiness of Defendant's purported request followed by his counsel's express agreement following the jury instructions as given waives appellate review. Defendant's argument is overruled.

V. Prejudice

¶ 20 North Carolina's statutes provide: "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2019). Even if we agreed the trial court erred in denying Defendant's requests regarding the self-defense, Defendant cannot carry his burden to show the court's refusal of his requested instruction "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012) (citation omitted).

¶ 21 In *State v. Chavez*, our Supreme Court held:

Where there is highly conflicting evidence in a case, an error in the jury instructions may tilt the scales and cause the jury to convict a defendant. In situations where the instructional error had a probable impact on the jury's finding that the defendant was guilty, a defendant can show plain error. In contrast, where the evidence against a defendant is overwhelming and uncontroverted[, a] defendant cannot show that, absent the error, the jury probably would have returned a different verdict.

State v. Chavez, 278 N.C. 265, 270, 2021-NCSC-86, ¶13, 2021 WL 355039 at *4 (2021) (citations and quotation marks omitted). Defendant cannot show prejudice because the evidence against him was both "overwhelming and uncontroverted." *Id.*

VI. Conclusion

¶ 22 Defendant's trial counsel's active participation in the formulation and express agreement on the instructions forecloses appellate review

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on this issue, “including plain error review.” *Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416. Defendant’s counsel’s express agreement to the instructions before and after they were given constitutes invited error and waives any right to appellate review concerning the invited error. *White*, 349 N.C. at 570, 508 S.E.2d at 275.

¶ 23 Presuming Defendant’s mother’s hearsay testimony of his phone call could be considered unasserted “self-defense,” in the face of “overwhelming and uncontroverted [evidence of guilt, a] defendant cannot show that, absent the error, the jury probably would have returned a different verdict.” *Chavez*, 278 N.C. at 270, 2021-NCSC-86, ¶ 13, 2021 WL 355039 at *4.

¶ 24 Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury’s verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge GORE concurs.

Judge MURPHY dissents with separate opinion.

MURPHY, Judge, dissenting.

¶ 25 The Majority incorrectly concludes “Defendant’s failure to object during the charge conference or after the instructions were given to the jury, along with his express agreement during the charge conference and after the instructions were given to the jury, constitutes invited error.” *Supra* at ¶ 18. In light of errors in the analysis to reach this conclusion, I respectfully dissent.

¶ 26 Additionally, while the Majority does not reach the merits of Defendant’s arguments, this dissent also encompasses the merits in the following sections. *See* N.C. R. App. P. 16(b) (2021) (“When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent[.]”).

BACKGROUND

¶ 27 On 10 April 2017, Defendant, Ivan Gerren Hooper, was indicted for assault by strangulation, possession of firearm by felon, communicating threats, assault on a female, and interfering with an emergency

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communication. On 5 February 2018, Defendant was indicted for attaining the status of a habitual felon. Defendant's trial began on 5 March 2018.

¶ 28 At trial, the evidence showed that on 4 March 2017, the mother of Defendant's child, Ashley Thomas, arrived with their son, Trent, at Defendant's hotel room at a Quality Inn. Subsequent events in the hotel room are disputed. However, following the disputed events in the hotel room, Defendant had been shot, and Thomas had "apparent bruising and swelling across the bridge of her nose and eyes[,] "bruising and red marks around both sides of her neck" and open wound scratches down her cheek and chest.

¶ 29 Thomas testified for the State. Thomas's testimony at trial indicated that the following events occurred:

[THOMAS:] When I first get into the hotel room, I sit my son down, and I sit down in the chair near the door. And [Defendant] says, "No, let me sit right here," and I said—

....

[THE STATE:] Okay. And— so what does [Defendant] say to you at that point?

[THOMAS:] He asked me to let him sit right there at the chair by the door, and I said, "Why does it matter where I sit? I'm fine sitting right here." "No, let me sit right here." So I don't move and he pulls up a chair directly in front of me in my face, and then he begins to question me about a guy that he assumed I had a relationship with.

He saw his cousin at the store before he met me at the hotel room and his cousin was telling him, "Yeah, she been dealing with him," blah, blah, blah, all this stuff like that. So then, he begins to question me about were we dealing and all this stuff, and I told him no. And so—

....

[THOMAS:] I said, "Is this really why you called me here?" And then, he said, "Well honestly, I don't care. I don't want you anyway, so you can really dismiss yourself." So I said, "Okay," and as I proceed to stand

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up and grab for my child, that's when he gets in my face, and pushes me, and starts punching me.

[THE STATE:] And where does he punch you?

[THOMAS:] He punches me in my face, in my stomach.

[THE STATE:] And what does he punch you with?

[THOMAS:] A closed fist.

[THE STATE:] Okay. And after you're standing there and he's punching you in the face with his closed fist, what transpires after that?

[THOMAS:] Then he takes me and slings me on the bed, climbs on top of me, and starts continuously hitting me in my face as I'm screaming, "Please don't do this in front of Trent," like—

....

[THOMAS:] He's punching me in the face, I'm trying to shield my face. I put my knee up to kind of try to push him off, and I'm screaming "Help," you know, and "Oh, my God," and everything like that and he just continues.

....

[THE STATE:] Does [Defendant] say anything to you at this point?

[THOMAS:] He says, "Nobody is going to be able to save you, but Trent, and even he is not going to be able to save you today. I'm going to kill you, [b----]."

....

[THE STATE:] And what else does, if anything, does he do to you?

[THOMAS:] Then somehow we get up off the bed. I think when I nudged him, we stood up, and that's when he threw me on the floor, climbed on top of me, and started choking me.

[THE STATE:] And what is going on with you while he's choking you?

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[THOMAS:] I feel myself about to lose consciousness like my vision's blurring, I can't breathe, I can't even scream.

[THE STATE:] And what is he choking you with?

[THOMAS:] His hands.

[THE STATE:] What happens after that?

[THOMAS:] After that, I think that's when I kneed him in his genital area and he finally got up. And I go directly over to the mirror and look at my face, and I'm like, "Oh, my God. I can't believe you actually did this." And then he tells me, "Get back up on the bed and you gonna call this [n---]."

And so, I grabbed for my phone and I looked and see my uncle's calling me as all of this is going on, and so, I try to call him back. And then, he smacks my phone out of my hand up against the wall and it shatters.

....

[THOMAS:] After he throws my phone, then that's when my attention is directed to the TV stand, and I see a firearm sitting there. And the first thing that goes through my head is "you've got to get this before he gets his hands on it." So I picked the gun up, and by this time I'm standing facing the door. So my back is to the mirror, and the bathroom, and all that.

And he grabs my son and puts my son in front of him like, "Shoot me. You not gonna shoot me." So then, I say, "Trent, come here, baby," and Trent runs over to me. And I say, "[Defendant], if you do not let me go, you leave me no choice but to shoot this gun."

And so, he act like he's going to lunge at me, so I pull the trigger, and the gun is pointed down towards the floor. And he said, "I've been shot, (*inaudible*) I've been shot." And I didn't know that he'd been shot because I didn't aim towards his head, his arms, nothing. I pointed directly to the floor.

So then, he jumps over and he grabs my hand because my hand is on the gun, and he's like, "Let the gun go.

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Let the gun go.” I said, “No, I’m not going to let the gun go, so you can do what you already planned to do.” And he says, “Well, we’ll let it go at the same time.” And I said, “No, I’m not letting it go.” And he says, “Well, if I let it go, can I leave with you?”

I said, “Sure,” anything so he would get off of me, so I could have my chance to get out. So when he lets go, I grab my son, I still have the gun in my hand, and I run out and get in my car.

¶ 30

Defendant did not testify at trial. However, Officer Jason Joyce, a witness for the State, testified about what Defendant told him on 5 March 2017:

[OFFICER JOYCE:] Myself and my lieutenant, Lieutenant Osborne, we spoke to [Defendant] in Room 101. He advised that on [4 March 2017] at about 6:00 PM, his— the mother of his child, Ashley Thomas, and their child, Trenton Thomas, came to the Quality Inn, I’m sorry, came to the Quality Inn, Room 101 at the Quality Inn.

[THE STATE:] And what did he tell you about that incident?

[OFFICER JOYCE:] [Defendant] stated the conversation turned into an argument with [] Thomas, and [] Thomas pulled a gun out on him and shot him in the leg.

[THE STATE:] Did he say anything else?

[OFFICER JOYCE:] Stated that when he saw the firearm, he advanced towards her and tried to get the firearm from her, and that they struggled with each other. Said it all happened in front of their son, Trenton, and that once he was shot, both of them left the scene.

[THE STATE:] And did he tell you anything about what this argument was about or anything?

[OFFICER JOYCE:] No, he did not.

[THE STATE:] Did he tell you anything else that led up to him being shot?

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[OFFICER JOYCE:] He stated that he was staying at the hotel to get away from people because of a death in the family. I asked him why he waited so long to report the shooting, and he stated he went to a friend of his house (*sic*), who was in the medical field, and they treated him. And he passed out because he had never been shot before.

¶ 31 Defendant's mother, Felicia Donnell, testified for Defendant. According to Donnell, Thomas called her after 4 p.m. on 4 March 2017 and recounted what happened in the hotel room:

[DONNELL:] When [Thomas] called me, I could tell that she was very upset, so I asked her what was going on. And she just told me, "I shot him. I shot your son."

[DEFENSE COUNSEL:] And—

[DONNELL:] Then I asked her to please tell me what went on, what took place, you know, for her to shoot him. So she went on to explain briefly that she went to where he was staying at that time. And honestly until this time, I didn't know it was a Days Inn, or a friend's home, or where he was that particular day.

But anyway, she let me know that she was fearing for her life and that she had a gun, and she and [Defendant] were standing in front of one another. And at that point, she said she had it pointed at him, and she asked him, "[Defendant], are you going to kill me?" And [Defendant] said— (*inaudible*) [Defendant] said to me (*sic*), "Give me the gun." And she said, "[Defendant], are you going to kill me?" He said, "[Thomas], give me the gun."

And then, a shot was fired, a scuffle happened, and then a fire, you know, a bullet happened again, and he looked down at his leg, is what she told me. I said, "You shot him in his leg?" And she said, "Yes." And she said that he looked down at his leg because they could see some blood and he said, "You shot me. You shot me."

So after that, I'm honest, I don't know what went down after that, but my main question was to [Thomas], "You left [your son] at your mom's home, right, when

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you went to see [Defendant]?” And she said, “No, he was there.” And I said, “He could have been hurt,” because I had told her on [3 March] while I was at the airport, “do not go over to see [Defendant] under any circumstances. Just stay away from him.” So I was shocked to get that phone call that she— when she called me on Saturday[.]

....

[DEFENSE COUNSEL:] And— so, [] Donnell, from what was conveyed to you, was it the fact that there was a scuffle after the weapon was fired?

[DONNELL:] A shot was fired, and then a scuffle happened. She told me exactly what happened. I said, “What did he do to you?” And she let me know that he did strangle her and that he punched her, but then a second fire happened at some point and that’s when, I think, both of— and I’m saying “think,” but she told me that they were standing because both of them looked down at his leg. She didn’t tell me which leg it was and they saw the blood—

....

[DEFENSE COUNSEL:] Okay. And so, you said based on that component is that there was no physical altercation until after the first shot was fired?

[DONNELL:] After a shot was fired.

....

[THE STATE:] And [] Thomas told you that she was strangled?

[DONNELL:] Uh-huh, after she fired the first shot, they got into that altercation.

¶ 32 At the close of the State’s evidence, and again at the close of all evidence, Defendant made motions to dismiss for insufficiency of the evidence, arguing the evidence showed Defendant was acting to defend himself. Both motions were denied.

¶ 33 During the initial charge conference, Defendant indicated he was satisfied with the jury instructions. The following day, immediately before the jury instructions were delivered, Defendant requested, for the

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first time, the jury be instructed on self-defense using a pattern jury instruction entitled “Self-Defense—Assaults Not Involving Deadly Force.” N.C.P.I.—Crim. 308.40 (2017). The State objected, noting “there was no notice provided that he intended to seek . . . any sort of defense, which he’s required to do.” The trial court denied Defendant’s request, stating “there was no notice given of [an] affirmative defense,” and “there [was] no other evidence that . . . anything was done in self-defense.”

¶ 34 The jury found Defendant not guilty of possession of a firearm by a felon and guilty of assault by strangulation, communicating threats, assault on a female, and interfering with an emergency communication. The jury also found Defendant guilty of having attained habitual felon status. A judgment was entered on 7 March 2018, sentencing Defendant to an active sentence of 65 to 90 months. Defendant did not give an oral notice of appeal in open court. However, on 30 August 2019, we allowed his *Petition for Writ of Certiorari* for the purpose of reviewing the judgment entered on 7 March 2018.

ANALYSIS**A. Preservation**

¶ 35 Our Rules of Appellate Procedure provide as a general rule that “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the [trial] court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1) (2021). Regarding the preservation of jury instructions, the rules state:

A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2) (2021). “For the purposes of Rule 10(a)(2), a request for instructions constitutes an objection.” *State v. Rowe*, 231 N.C. App. 462, 469, 752 S.E.2d 223, 227 (2013).

¶ 36 Here, the following colloquy occurred following the charge conference and before the jury was charged:

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THE COURT: All right, Sheriff, bring the jury in, please.

[DEFENSE COUNSEL]: Your Honor, may I have just one moment?

THE COURT: Yes.

....

[DEFENSE COUNSEL]: Your Honor, I think it's reasonable based on information that has been presented that the— that self-defense component in this particular jury instruction would be appropriate, as well, [as] the 308.40 to be elicited here in this particular matter.

Also secondly with that, Your Honor, I do have a case to hand up. I think that would be reflective of that, as well, based on the evidence that has been presented at this time.

THE COURT: Okay. Well, you said yesterday you were satisfied with the instructions as the [c]ourt had outlined [it] is going to give.

[DEFENSE COUNSEL]: And Your Honor, (*inaudible*) back where we started in that component, so I wanted to make sure that (*inaudible*) would be appropriate, Your Honor.

THE COURT: And you want to be heard further?

[DEFENSE COUNSEL]: Yes, Your Honor. Simply as we look at this particular matter, the State v. Jennings, this is 276 NC 157. This particular matter, as it reflects to a slightly more serious— it's a murder allegation, but still when it reflects what takes place with a self-defense proposition, that should be provided to the jurors. The piece here, I think, that falls in line with this particular matter is that obviously whatever has been charged, whatever was done, the fact still remains that this particular matter that's in front of the [trial court] today, it is most appropriate that this particular test here for self-defense should be appropriated— is appropriate and should be provided to the jurors.

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With that, the actions that were done, the timeliness of the actions, all of those components are supported and would be prudent to make sure that the jurors are aware of this particular action that will be most beneficial, I think, in this matter.

....

THE COURT: Well, I have to agree with the State. The notice— there was no notice given of affirmative defense, and because that— and because we don’t know what was in [] Defendant’s mind because he exercised his constitutional right not to testify, we don’t know what he was thinking or what he believed. And there’s been no other evidence that this was a— anything was done in self-defense. The request for a self-defense instruction is denied.

Bring the jury in, please, Sheriff.

¶ 37 “As Defendant specifically requested the trial court to include a jury instruction on [self-defense] and argued that point before the [trial] court, . . . he properly preserved this issue for appellate review.” *Id.* at 469-70, 752 S.E.2d at 228.

¶ 38 The Majority relies on *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999), to conclude “[t]he tardiness of Defendant’s purported request followed by his counsel’s express agreement following the jury instructions as given waives appellate review.” *Supra* at ¶ 19. In *White*, the defense counsel requested that the trial court give peremptory instructions to the jury regarding nonstatutory mitigating circumstances. *White*, 349 N.C. at 568, 508 S.E.2d at 274. However, the defense counsel cited the pattern instruction for the peremptory instruction only for statutory mitigating circumstances, not for nonstatutory mitigating circumstances. *Id.* at 569, 508 S.E.2d at 274. When the trial court clarified the language it would use in the jury instruction, the defense counsel agreed. *Id.* Our Supreme Court observed:

[The] [d]efense counsel thus agreed with this proposed language, made no objection to it, and neither suggested nor provided any other language either orally or in writing. Thereafter, the trial court instructed the jury exactly as it had indicated. [The]

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[d]efense counsel did not object at this point either, though given the opportunity.

. . . .

[The] defense counsel did not submit any proposed instructions in writing. Counsel also did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, [the] defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. at 569-70, 508 S.E.2d at 274-75.

¶ 39

White is distinguishable from the facts of the present case because here, while Defendant did not say the words “I object” after the charge had been given, his “request for instructions constitutes an objection.” *Rowe*, 231 N.C. App. at 469, 752 S.E.2d at 227. Further, Defendant’s request for a self-defense jury instruction was denied, whereas in *White*, the trial court instructed the jury based on the instruction the defense counsel requested and the proposed language they agreed to.¹ *White*, 349 N.C. at 568-70, 508 S.E.2d at 274-75. Under our precedent in *Rowe*, Defendant did not waive appellate review. “The fact that [Defense] [C]ounsel did not say the words ‘I object’ is not reason to deny appellate review” *Id.* at 470, 752 S.E.2d at 228.

1. Although the defendant in *White* also requested an instruction, the request for an instruction there could not constitute an objection. Where a request for instructions is granted and the defendant approves the language used in the instruction, like in *White*, a request for instructions cannot constitute an objection, as there is no longer anything for a defendant to object to. *See State v. Roache*, 358 N.C. 243, 296, 595 S.E.2d 381, 415 (2004) (citations omitted) (“The trial court sustained [the] defendant’s objections to the questions specifically addressed by [the] defendant in his brief to this Court. This Court will not review the propriety of questions for which the trial court sustained a defendant’s objection absent a further request being denied by the [trial] court. No prejudice exists, for when the trial court sustains an objection to a question the jury is put on notice that it is not to consider that question. Accordingly, any error alleged by [the] defendant to result from these questions is not properly before the Court, and regardless would not have resulted in prejudice.”). In order for a request for an instruction to constitute an objection in this context, there would need to be a subsequent request for the instruction or a formal objection to the instructions. *See id.*; but *see State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) (“[A] request for an instruction at the charge conference is sufficient compliance with [Rule 10] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge’s attention at the end of the instructions.”).

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B. Merits of Defendant's Argument

¶ 40 Defendant argues the trial court erred in denying his request for an instruction on self-defense because there is “conflicting evidence regarding what happened at the Quality Inn, [and] when viewed in the light most favorable to [Defendant], [the evidence] supported an instruction on self-defense.” The State argues the trial court did not err in denying Defendant an instruction on self-defense because (1) Defendant “did not present competent evidence of self-defense” and (2) “Defendant did not provide required notice.” Defendant also argues that, to the extent the trial court’s denial of his requested self-defense instruction was a sanction for failure to comply with the discovery statutes, “the trial court did not make the ‘specific findings’ that would be required for it to bar a jury instruction as a discovery sanction.”

¶ 41 It would only have been proper for the trial court to refuse the self-defense instruction here if there was not sufficient evidence, when viewed in the light most favorable to Defendant, to support the instruction, and/or if the trial court used the refusal of the instruction as a sanction for Defendant’s discovery violation.

1. Sufficient Evidence of Self-Defense

¶ 42 Defendant argues “[t]he evidence that [] Thomas possessed a gun and initiated the struggle by aiming the gun at [Defendant] was sufficient to entitle [him] to the requested self-defense instruction, and there was a reasonable possibility the outcome would have been different had the jury been fully instructed.” We review a trial court’s decision regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

¶ 43 “[W]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case[.]” *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis omitted). “In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to [the] defendant.” *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989). “Where there is evidence that [the] defendant acted in self-defense, the [trial] court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant’s evidence.” *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); see *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (“[I]f the defendant’s evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State’s evidence is contradictory.”).

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¶ 44 “[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *State v. Locklear*, 259 N.C. App. 374, 377, 816 S.E.2d 197, 201 (2018) (marks omitted); *see also* N.C.G.S. § 15A-1443(a) (2019). “The burden of showing such prejudice . . . is upon the defendant.” N.C.G.S. § 15A-1443(a) (2019).

¶ 45 N.C.G.S. § 14-51.3 provides a defendant who uses non-deadly force to defend himself will be immune from criminal liability:

(a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful force. . . .

(b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force

N.C.G.S. § 14-51.3 (2019).

¶ 46 Here, the evidence presented at trial, when interpreted in the light most favorable to Defendant, is sufficient to entitle him to a jury instruction on self-defense. Specifically, Donnell testified Thomas told her the timeline of events was that Thomas first fired the gun, then Defendant became physical with Thomas, then Thomas fired another shot:

[DEFENSE COUNSEL:] Okay. And so, you said based on that component is that there was no physical altercation until after the first shot was fired?

[DONNELL:] After a shot was fired.

. . . .

[THE STATE:] And [] Thomas told you that she was strangled?

[DONNELL:] Uh-huh, after she fired the first shot, they got into that altercation.

Officer Joyce’s testimony corroborates Donnell’s testimony:

[OFFICER JOYCE:] [Defendant] stated the conversation turned into an argument with [] Thomas, and

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[] Thomas pulled a gun out on him and shot him in the leg.

[THE STATE:] Did he say anything else?

[OFFICER JOYCE:] Stated that when he saw the firearm, he advanced towards her and tried to get the firearm from her, and that they struggled with each other. Said it all happened in front of their son, Trenton, and that once he was shot, both of them left the scene.

¶ 47 Taken as true and in the light most favorable to Defendant, this testimony is sufficient to support Defendant's request for a self-defense instruction as it shows Thomas pointing a gun at Defendant gave rise to his reasonable belief "that the conduct [was] necessary to defend himself . . . against [Thomas's] imminent use of unlawful force." N.C.G.S. § 14-51.3(a) (2019). Even though Thomas's testimony indicates Defendant became physical *before* she pointed the gun at him, the trial court was still obligated to instruct on self-defense. *See Moore*, 363 N.C. at 796, 688 S.E.2d at 449 (emphasis added) ("[I]f the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given *even though the State's evidence is contradictory*."). "With conflicting evidence, it was for the jury to determine which individual was the initial aggressor." *State v. Parks*, 264 N.C. App. 112, 117, 824 S.E.2d 881, 885 (2019). The trial court erred by failing to include an instruction on self-defense in its final mandate to the jury. Defendant is entitled to a new trial if this error was prejudicial to him, such that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2019).

¶ 48 Defendant relies on *State v. Gomola* to argue "the trial court's error in denying the requested instruction deprived the jury of the ability to assess whether [Defendant] acted lawfully." *See State v. Gomola*, 257 N.C. App. 816, 810 S.E.2d 797 (2018). In *Gomola*, we held the defendant was entitled to a new trial because "the lack of a self-defense/defense of others instruction deprived the jury of the ability to decide the issue of whether [the defendant's] participation in the altercation was lawful." *Id.* at 823, 810 S.E.2d at 803.

¶ 49 The lack of a self-defense instruction here similarly deprived the jury of the ability to decide the issue of whether Defendant's participation in the altercation was lawful. A determination by the jury that Defendant's participation was lawful could have compelled the jury to return a verdict of "not guilty," especially in light of the jury finding Defendant was

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not guilty of possession of a firearm. Defendant was prejudiced by the trial court's refusal to submit a self-defense instruction to the jury.

¶ 50 The evidence was sufficient to require the trial court to instruct the jury on self-defense, and the trial court erred by failing to do so based on a lack of evidence. This error prejudiced Defendant. Having concluded the trial court erred in failing to instruct the jury on self-defense, “[t]he question remains whether the trial court’s denial of [D]efendant’s request for a[] [self-defense] instruction may be upheld as a sanction for [D]efendant’s failure to provide adequate notice of his defense.” *State v. Foster*, 235 N.C. App. 365, 376, 761 S.E.2d 208, 216 (2014).

2. Refusal as a Sanction for a Discovery Violation

¶ 51 In light of the determination that the evidence, when viewed in the light most favorable to Defendant, supports a jury instruction on self-defense, it must be addressed whether the trial court properly refused the instruction as a sanction for a discovery violation. The State argues “the trial court did not err by denying Defendant an instruction on self-defense because Defendant did not provide required notice” pursuant to N.C.G.S. § 15A-905.

¶ 52 If a defendant voluntarily provides discovery under N.C.G.S. § 15A-902(a), the defendant is required to comply with N.C.G.S. § 15A-905(c), and he must “[g]ive notice to the State of the intent to offer at trial a defense of . . . self-defense[.]” N.C.G.S. § 15A-905(c)(1) (2019); *see* N.C.G.S. § 15A-905(d) (2019). Here, Defendant agreed to voluntarily provide reciprocal discovery in compliance with N.C.G.S. § 15A-905. As a result, N.C.G.S. § 15A-905(c)(1) required Defendant to provide the State with notice of his intent to offer the defense of self-defense at trial “within 20 working days after the date the case is set for trial.” N.C.G.S. § 15A-905(c)(1) (2019). In this case, the trial court implicitly found Defendant violated N.C.G.S. § 15A-905(c)(1) because “there was no notice given of [an] affirmative defense[.]” It appears the trial court used this violation as part of its basis for its refusal to submit the issue of self-defense to the jury.

¶ 53 If a trial court determines that a defendant has violated N.C.G.S. § 15A-905(c)(1) by failing to provide advance notice of a defense, it may impose any of the following sanctions on a defendant:

- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or
- (3) Prohibit the party from introducing evidence not disclosed, or

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- (3a) Declare a mistrial, or
- (3b) Dismiss the charge, with or without prejudice, or
- (4) Enter other appropriate orders.

N.C.G.S. § 15A-910(a) (2019). We have previously treated a trial court's denial of a defendant's request for jury instructions as a sanction under N.C.G.S. § 15A-910(a)(3) when the defendant failed to provide notice, even when the trial court did not explicitly refer to the denial as a sanction. *See State v. Pender*, 218 N.C. App. 233, 243-44, 720 S.E.2d 836, 843, *disc. rev. denied, appeal dismissed*, 366 N.C. 233, 731 S.E.2d 414 (2012), *cert. dismissed*, 374 N.C. 264, 839 S.E.2d 845 (2020); *see also State v. Jones*, 260 N.C. App. 104, 107, 816 S.E.2d 921, 924 (2018) ("The sanction for failure to give notice of a defense of self-defense is normally exclusion of evidence upon the State's objection or refusal to give a jury instruction on self-defense."), *disc. rev. denied, cert. dismissed, appeal dismissed*, 372 N.C. 710, 831 S.E.2d 90 (2019). Just as in *Pender*, here, the trial court's denial of Defendant's request for a self-defense instruction is treated as a sanction for a discovery violation under N.C.G.S. § 15A-910(a)(3).

¶ 54

"Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article." N.C.G.S. § 15A-910(b) (2019). "If the court imposes any sanction, it must make specific findings justifying the imposed sanction." N.C.G.S. § 15A-910(d) (2019). "[T]he determination of whether to impose sanctions [is] solely within the discretion of the trial court." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002), *disc. rev. denied, appeal dismissed*, 356 N.C. 687, 578 S.E.2d 320, *cert. denied*, 540 U.S. 842, 157 L. Ed. 2d 76 (2003). "[T]he trial court's decision will only be reversed for an abuse of discretion upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (marks omitted).

As explained by our Supreme Court, the rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, that defendants receive a fair trial and not be taken by surprise. They were not enacted to serve as mandatory rules of exclusion for trivial defects in the State's mode of compliance. Despite the General Assembly's emphasis on protecting defendants from

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the State's noncompliance, such legislative intent does not give defendants *carte blanche* to violate discovery orders, but rather, defendants and defense counsel both must act in good faith, just as is required of their counterparts representing the State. Thus, the rules of discovery have been applied with equal force to both defendants and the State to ensure a fair trial and avoid unfair surprise for both parties.

Foster, 235 N.C. App. at 377, 761 S.E.2d at 217 (citations and marks omitted).

¶ 55 Presuming the trial court purported to deny Defendant's request for an instruction on self-defense as a sanction for Defendant's failure to provide the State with prior notice, it must be determined whether the trial court abused its discretion in imposing this sanction.

[I]n considering the totality of the circumstances prior to imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

Id. at 380-81, 761 S.E.2d at 219.

¶ 56 In this case, the trial court implicitly found that Defendant violated N.C.G.S. § 905(c)(1) because "there was no notice given of [an] affirmative defense" and, contrary to Defendant's position in his reply brief, our review of the Record indicates Defendant failed to give notice when required to do so. The trial court then used this violation as an additional basis for its refusal to submit the issue of self-defense to the jury. Presuming the trial court intended to deny the self-defense instruction as a sanction on the basis of a discovery violation, it made no specific findings "justifying the imposed sanction" to deny Defendant's requested

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instruction on self-defense in accordance with N.C.G.S. § 15A-910(d). N.C.G.S. § 15A-910(d) (2019). “The [trial] court simply found that [D]efendant failed to fully comply with the notice statute[,]” and “the [R]ecord suggests that the trial court [referred to the notice requirement] simply as an afterthought to bolster its decision not to instruct the jury on [self-defense].” *Foster*, 235 N.C. App. at 381, 761 S.E.2d at 219-220.

¶ 57

The lack of findings justifying the trial court’s decision on Defendant’s request for a jury instruction on self-defense was not the result of a reasoned decision. *See id.* at 381, 761 S.E.2d at 219 (“The procedure followed by the trial court, the failure to find prejudice, and the lack of findings are inconsistent with the [trial] court’s ruling being a reasoned decision to further the purposes of the rules of discovery.”); *see also State v. Barnett*, COA18-1183, 266 N.C. App. 140, 828 S.E.2d 754, 2019 WL 2505384 *8 (2019) (unpublished) (“Presuming *arguendo*, [the] [d]efendant’s failure to provide the State with prior notice of [the] defense of [self-defense] could justify denying a jury instruction on the defense of [self-defense,] [i]t does not follow that the trial court could deny [the] [d]efendant’s requested instruction on [self-defense] when the instruction is supported by the evidence viewed in the light most favorable to [the] [d]efendant.”). The trial court abused its discretion in refusing to instruct the jury on self-defense when it failed to properly make findings and consider the appropriateness of the sanction for the failure of Defendant to provide notice of his intent to assert the defense of self-defense. Defendant is entitled to a new trial.

CONCLUSION

¶ 58

Defendant preserved his arguments for appellate review by requesting that the trial court instruct the jury on self-defense before the jury was charged. Defendant presented sufficient evidence to warrant submission of the self-defense affirmative defense to the jury. Further, the trial court abused its discretion when precluding the self-defense jury instruction as a sanction for Defendant failing to provide notice of his intent to rely upon the self-defense affirmative defense. I would hold Defendant is entitled to a new trial based on these prejudicial errors. For these reasons, I respectfully dissent.

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STATE OF NORTH CAROLINA

v.

KEVIN LEE JOHNSON

No. COA20-564

Filed 21 September 2021

1. Appeal and Error—preservation of issues—traffic stop—drug seizure—meritorious argument

The Court of Appeals invoked Appellate Rule 2 to review defendant's constitutional challenge to the seizure of drugs from his pants pocket after he was pulled over for a seatbelt violation because, in the event he did not properly preserve the issue for appeal, he presented a meritorious argument that required review in order to prevent manifest injustice.

2. Search and Seizure—traffic stop—seatbelt violation—request for consent to search person—voluntariness

During a traffic stop for a seatbelt violation, an officer's request for consent to search defendant's person without reasonable articulable suspicion of unrelated criminal activity resulted in an unconstitutional extension of the traffic stop. In light of the unlawful detention, defendant's consent to the search of his person was not voluntary, and his motion to suppress drugs found in his pants pocket should have been granted.

Judge CARPENTER concurring in a separate opinion.

Judge GRIFFIN concurring in a separate opinion.

Appeal by Defendant from Judgment entered 25 February 2020 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Associate Attorneys General Jarrett McGowan and Robert Pickett, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

HAMPSON, Judge.

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Factual and Procedural Background

¶ 1 Kevin Lee Johnson (Defendant) appeals a Judgment entered upon his guilty pleas to Felony Possession of Cocaine and to having attained Habitual-Felon Status. The Record tends to reflect the following:

¶ 2 On the afternoon of 22 December 2017, Lieutenant Chris Stone (Lieutenant Stone) of the Iredell County Sheriff's Office was on duty and "sitting in the parking lot of a convenience store" on Taylorsville Highway. Lieutenant Stone saw Defendant get in a vehicle in the convenience store parking lot. According to Lieutenant Stone, he did not see Defendant put on his seatbelt upon entering the vehicle. Lieutenant Stone observed Defendant as Defendant drove past Lieutenant Stone's patrol car and, according to Lieutenant Stone, Defendant had still not put on his seatbelt. Lieutenant Stone initiated a traffic stop of Defendant's vehicle moments after Defendant drove out of the convenience store parking lot. When Lieutenant Stone approached the driver's window of Defendant's vehicle, he noticed Defendant still did not have his seatbelt on. Lieutenant Stone informed Defendant he stopped him for a seatbelt infraction but that Lieutenant Stone "was not going to write him a citation. If that's all that was wrong, then [Lieutenant Stone] was going to give him a warning."

¶ 3 Almost immediately, Lieutenant Stone asked Defendant to get out of Defendant's vehicle and "come back to [Lieutenant Stone's] vehicle." As Defendant walked back towards Lieutenant Stone's vehicle, Lieutenant Stone asked Defendant if "[Defendant] had anything illegal in his possession." Defendant said "no." Lieutenant Stone then asked if he "could search [Defendant]." Video from Lieutenant Stone's patrol car shows Defendant stop, as he is still walking back towards Lieutenant Stone's patrol car, and raise his hands above his waist. Lieutenant Stone proceeded to reach into Defendant's sweatshirt pockets, then into Defendant's trouser pockets. Eventually, Lieutenant Stone reached into Defendant's right trouser pocket and found "a plastic wrapper with some type of soft material inside, which [Lieutenant Stone] believed was possibly powder cocaine[.]" Video evidence reflects Lieutenant Stone never conducted an external pat down of Defendant's person before instructing Defendant to get in the front passenger seat of the patrol vehicle.

¶ 4 Lieutenant Stone placed Defendant in the front seat of his patrol vehicle and ran Defendant's license to make sure it was valid. Lieutenant Stone "advised [Defendant] that if he was interested in working with one of our narcotics detectives, he could possibly avoid being charged." Lieutenant Stone gave Defendant a "name and phone number to call."

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Lieutenant Stone did not charge Defendant for possession of cocaine that day; Lieutenant Stone allowed Defendant to return to his vehicle and leave. However, Lieutenant Stone “followed up with [his] supervisor . . . a short time later” and learned Defendant had not contacted the Sheriff’s Office.

¶ 5 On 5 March 2018, an Iredell County Grand Jury indicted Defendant on charges of Felony Possession of Cocaine and Felony Possession of Drug Paraphernalia as well as having attained Habitual-Felon Status. On 6 March 2019, Defendant filed a Motion to Suppress “the cocaine found in his pocket.” In his Motion, Defendant argued Lieutenant Stone did not have reasonable suspicion to stop Defendant for the seatbelt infraction and, even if the stop was lawful, Lieutenant Stone’s “going through the Defendant’s pockets for a violation of a seatbelt was excessive, unconstitutional, and unlawful.” Defendant argued he did not give Lieutenant Stone consent to search his pockets—Defendant supported the Motion with a signed affidavit stating Defendant consented “to be patted down for weapons” but not for a search of his pockets.

¶ 6 Defendant’s Motion came on for hearing on 8 November 2019. During the hearing, Lieutenant Stone testified: “I asked him if he had anything illegal in his possession. That’s what I always ask people. . . . I asked him if I could search him. I did not ask if I could pat him down. . . . I teach new deputies . . . [a]lways ask to search [people].” When asked why he always asks to search people during traffic stops, Lieutenant Stone replied: “For safety reasons, you know. If somebody has a weapon on them, then I definitely want to know that. . . . I want to know that before they sit in the front seat of my car.”

¶ 7 Defendant also testified at the hearing. Defendant claimed that he had, in fact, been wearing his seatbelt when Lieutenant Stone pulled him over. Defendant also testified Lieutenant Stone asked if he could “pat [Defendant] down for weapons[.]” Defense counsel argued the evidence did not support a finding Lieutenant Stone had reasonable suspicion to stop Defendant for not wearing a seatbelt. Defense counsel also argued, in the alternative, that Defendant did not give knowing consent for Lieutenant Stone to search Defendant’s pockets. Thus, according to Defendant, although Lieutenant Stone could have frisked Defendant as part of the traffic stop with Defendant’s consent, because Lieutenant Stone lacked reasonable suspicion of criminal activity beyond the seatbelt infraction, Defendant’s consent could not knowingly extend past a frisk allowed for officer safety.

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¶ 8

The trial court made the following oral Findings and Conclusions:

The officer stopped the defendant, told him he stopped him for a seatbelt violation, but was just giving him a warning. The court finds at that point, that the officer had reasonable suspicion to stop the vehicle because of his observations about the seatbelt. At that point, after asking – after telling the defendant that he was just giving him a warning, the officer asked the defendant if there was anything illegal on his person. The defendant responded there was not. The officer asked, “can I search you?” The defendant gave consent to search. The officer conducted a search and found a package that he believed to be powder cocaine. The court finds that the officer asked for the defendant’s consent to search, and the defendant gave consent to search. However, the defendant indicates that the officer asked if he could pat him down. The court finds that if that were the situation, then when the officer did pat him down and felt an object in his pocket that was – that was a knotted bag, that that would come under the plain [feel] exception, and he would have had – the officer would have had probable cause to be able to retrieve that item. And so, either way the court does find that the officer’s actions were justified in this matter. So, therefore the motion to suppress is denied.

¶ 9

Subsequently, upon the denial of his Motion to Suppress, Defendant entered guilty pleas to Felony Possession of Cocaine and having attained Habitual-Felon-Status as evidenced by the Transcript of Plea. Defendant’s Transcript of Plea expressly reserved Defendant’s right to appeal the trial court’s denial of his Motion to Suppress. Defendant gave oral Notice of Appeal at the plea hearing and filed written Notice of Appeal on 25 February 2020.

Issues

¶ 10

The issues on appeal are whether: (I) Defendant has preserved his argument his consent was involuntary on the basis Lieutenant Stone strayed from the traffic stop’s mission and measurably prolonged the stop; and, if so, (II) the trial court erred in denying Defendant’s Motion to Suppress evidence of the cocaine found on Defendant because Defendant’s consent for the search was involuntary as a matter of law.¹

1. On appeal, Defendant also argues: Lieutenant Stone exceeded the scope of the consent Defendant gave because Defendant only consented to an external frisk; the trial

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AnalysisI. Preservation

¶ 11 **[1]** As a threshold matter, the State contends that because Defendant did not specifically argue before the trial court that the search was unrelated to the mission of the traffic stop and added undue delay to the stop, Defendant has not preserved this theory for appeal under Rule 10(a)(1) of our Rules of Appellate Procedure. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires:

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired . . . if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's . . . motion.

N.C. R. App. P. 10(a)(1) (2021). “The theory upon which the case is tried in the lower court must control in construing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal[.]” *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted). Moreover, “a defendant may not assert on appeal a new theory for suppression which was not asserted at trial.” *State v. Smarr*, 146 N.C. App. 44, 56, 551 S.E.2d 881, 88 (2001) (concluding the defendant’s “fruit of the poisonous tree” argument on appeal, based on a lack of Miranda warnings, should not be considered where the defendant argued his admission was inadmissible because it was not knowing and voluntary or that the testimony regarding the admission was not the best evidence at trial).

¶ 12 Where a defendant does not argue a constitutional theory at trial and later argues a constitutional theory on appeal, or a defendant argues one constitutional theory at trial and a different constitutional theory on appeal, the defendant may be deemed to have failed to preserve their appellate arguments under Rule 10(a)(1). *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519; *State v. Bursell*, 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019) (“The transcript from the sentencing hearing reveals that

court erred by failing to make Findings regarding the voluntariness of Defendant’s consent; and, even if the search did not violate the Fourth Amendment to the United States Constitution, it violated Art. I § 20 of the North Carolina Constitution. However, because we conclude Lieutenant Stone’s request for consent to search and subsequent search of Defendant’s pockets constituted an unreasonable search and seizure, we do not reach these arguments.

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defendant did not clearly raise the constitutional issue of whether the lifetime SBM imposed on him constituted a reasonable search under the Fourth Amendment. Though defense counsel specifically objected to imposition of lifetime SBM, this objection questioned the sufficiency of the evidence supporting the SBM order.”); *State v. McPhail*, 329 N.C. 636, 640-41, 406 S.E.2d 591, 595 (1991) (“[T]he defendant objected on the ground that allowing his own expert to testify for the State would violate his due process rights under the fourteenth amendment. The trial court overruled that objection. On appeal, the defendant now contends for the first time that allowing his expert to be called and to testify as a witness for the State violated his sixth amendment right to effective assistance of counsel. Having failed to challenge the admission of the evidence in question on this ground during the trial, the defendant will not be allowed to do so for the first time on his appeal to this Court.”).

¶ 13

In this case, Defendant argued in his Motion to Suppress:

10. The officer did not have the ability to clearly see whether or not the Defendant was wearing his seatbelt. Defendant maintains that he was wearing his seatbelt. The stop of the vehicle was without reasonable suspicion and was therefore unconstitutional.

11. Even if the Court determines that the stopping of the Defendant’s vehicle was lawful, the search of going through the Defendant’s pockets for a violation of a seatbelt was excessive, unconstitutional, and unlawful. . . .

. . . .

13. That the defendant’s person was unlawfully searched and property was seized by Officer Stone in violation of the Fourth Amendment to the United States Constitution and in violation of the North Carolina Constitution and that the recovery of items from the defendant’s person by an officer acting without a search warrant was as a result of an unconstitutional search and seizure.

¶ 14

Here, unlike in the cases cited above, Defendant did not argue the evidence was inadmissible based on one constitutional provision at trial and another provision on appeal. Defendant argued Lieutenant Stone did not have reasonable suspicion for the stop generally and that Defendant’s “person was unlawfully searched and property was seized by Officer

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Stone in violation of the Fourth Amendment[.]” Thus, Defendant argued Lieutenant Stone’s search violated Defendant’s right to be free from unreasonable search and seizure as protected by the Fourth Amendment. On appeal, Defendant continues to argue Lieutenant Stone’s search violated Defendant’s rights as protected by the Fourth Amendment, albeit on slightly different factual bases than Defendant argued to the trial court. Although Defendant now argues Lieutenant Stone strayed from the traffic stop’s mission and added measurable delay to the stop, thus rendering the search unlawful, Defendant has not changed his underlying constitutional basis for suppression. *See Smarr*, 146 N.C. App. at 56, 551 S.E.2d at 88. Consequently, Defendant preserved this issue for appeal.

¶ 15 Moreover, even if Defendant did not preserve this issue for appeal under Rule 10(a)(1), Rule 2 of our Rules of Appellate Procedure affords this Court the discretion to waive Rule 10(a)(1)’s requirements to reach the merits of Defendant’s arguments. Rule 2 provides:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules . . . upon application of a party or upon its own initiative[.]

N.C. R. App. P. 2 (2021). In fact, recognizing he may have not preserved this issue on appeal, Defendant asks this Court, in the alternative, to exercise its discretion under Rule 2 to reach the merits of his argument.

¶ 16 “ ‘Rule 2 must be applied cautiously,’ and it may only be invoked ‘in exceptional circumstances.’ ” *Bursell*, 372 N.C. at 200, 827 S.E.2d at 305 (quoting *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007)). “A court should consider whether invoking Rule 2 is appropriate ‘in light of the specific circumstances of individual cases and parties, such as whether ‘substantial rights of an appellant are affected.’ ” *Id.* (quoting *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citation and quotation marks omitted)). “As a result, a decision to invoke Rule 2 and suspend the appellate rules is always a discretionary determination.” *Id.* at 201, 827 S.E.2d at 306 (citation and quotation marks omitted).

¶ 17 In this case, if Defendant failed to satisfy Rule 10(a)(1) to preserve his Fourth Amendment argument based on the facts argued on appeal, Defendant did raise directly related issues in his Motion to Suppress, which are necessarily intertwined with any analysis of the traffic stop under the Fourth Amendment. Unlike in other cases—including cases where this Court has chosen to exercise its discretion under Rule 2

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and reach the merits of appellants' unpreserved arguments—here, Defendant's Motion did argue similar constitutional theories in the trial court. *See State v. Hall*, 134 N.C. App. 417, 424, 517 S.E.2d 907, 912 (1999) (reviewing the defendant's in-court identification argument based on a theory not raised in the trial court); *see also State v. Adams*, 250 N.C. App. 664, 674, 794 S.E.2d 357, 364 (2016) (exercising discretion under Rule 2 to review the trial court's denial of the defendant's motion to suppress when the defendant did not object to the evidence at trial).

¶ 18 Moreover, our courts have “tended to invoke Rule 2 for the prevention of ‘manifest injustice’ in circumstances in which substantial rights of an appellant are affected.” *Hart*, 361 N.C. at 316, 644 S.E.2d at 205 (citation omitted). But, where “the result would be no different if we chose to invoke Rule 2 to suspend the rules[,]” there is likely no manifest injustice. *State v. Patterson*, 185 N.C. App. 67, 73, 648 S.E.2d 250, 254 (2007) (declining to exercise Rule 2 discretion where the defendant's argument had no merit and reviewing the argument would not change the outcome of the case). Here, however, Defendant raises a meritorious argument on appeal—thus, declining to exercise our discretion to review Defendant's argument would constitute manifest injustice where the State could not prove its case against Defendant without the challenged evidence. *See State v. Mullinax*, 180 N.C. App. 439, 443, 637 S.E.2d 294, 297 (2006) (reviewing defendant's assignment of error under Rule 2, in part, “[b]ecause of the potential impact on defendant's sentence from an incorrect prior record level calculation”). Therefore, assuming Defendant has failed to preserve his argument under N.C. R. App. P. 10(a)(1), we exercise our Rule 2 discretion to address the merits of Defendant's argument.

II. Consent

¶ 19 [2] Defendant argues, even if he consented to Lieutenant Stone's request for a full search, that consent was involuntary because the request and search was outside the traffic stop's scope, added time to the stop, and was not supported by reasonable suspicion of any criminal activity beyond the seatbelt infraction.

¶ 20 “When reviewing a ruling on a motion to suppress, we analyze whether the trial court's ‘underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law.’ ” *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)) (alterations in original). Here, the trial court found and concluded:

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The officer stopped the defendant, told him he stopped him for a seatbelt violation, but was just giving him a warning. The court finds at that point, that the officer had reasonable suspicion to stop the vehicle because of his observations about the seatbelt. At that point, after asking – after telling the defendant that he was just giving him a warning, the officer asked the defendant if there was anything illegal on his person. The defendant responded there was not. The officer asked, “can I search you?” The defendant gave consent to search. The officer conducted a search and found a package that he believed to be powder cocaine. The court finds that the officer asked for the defendant’s consent to search, and the defendant gave consent to search. However, the defendant indicates that the officer asked if he could pat him down. The court finds that if that were the situation, then when the officer did pat him down and felt an object in his pocket that was – that was a knotted bag, that that would come under the plain [feel] exception, and he would have had – the officer would have had probable cause to be able to retrieve that item. And so, either way the court does find that the officer’s actions were justified in this matter. So, therefore the motion to suppress is denied.

¶ 21 Even if Defendant had consented to a full search in this context², such a Finding would not have supported the legal conclusion Defendant’s consent was voluntary as a matter of law. “The Fourth Amendment to the United States Constitution states that ‘[t]he right of the people to be secure . . . , against unreasonable searches and seizures, shall not be violated.’ ” *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (citing U.S. Const. amend. IV) (alterations in original). “ ‘A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.’ ” *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407, 160 L. Ed. 2d 842, 846 (2005)). “[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver’s consent or reasonable

2. The trial court’s findings do not resolve the dispute over the scope of Defendant’s consent to be searched—that is, whether Defendant was consenting to be frisked for weapons or consenting to the full search of the interior of his pockets for contraband.

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articulable suspicion that illegal activity is afoot. *Id.* (holding consent to search *after* the mission of the traffic stop was complete was voluntary) (citing *Florida v. Royer*, 460 U.S. 491, 497-98, 75 L. Ed. 2d 229, 236 (1983)). However, where “consent to search . . . was the product of an unconstitutional seizure,” it is involuntary. *State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014). Moreover, “[i]f the officer’s request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity.” *State v. Parker*, 183 N.C. App. 1, 9, 644 S.E.2d 235, 241-42 (2007) (citation omitted).

¶ 22 “ ‘Beyond determining whether to issue a traffic ticket, an officer’s mission includes ordinary inquiries incident to [the traffic] stop.’ ” *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (quoting *Rodriguez v. United States*, 575 U.S. 348, 355, 191 L. Ed. 2d 492, 499 (2015) (citation and quotation marks omitted))(alterations in original). “These inquiries include checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.” *Id.* (citation and quotation marks omitted). “In addition, ‘an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely[.]’ ” including conducting criminal history checks. *Id.* at 258, 805 S.E.2d at 673-74 (citations omitted). Officer safety “stems from the mission of the traffic stop[.]” thus, “time devoted to officer safety is time that is reasonably required to complete that mission.” *Id.* at 262, 805 S.E.2d at 676. “On-scene investigation into other crimes, however, detours from that mission.” *Rodriguez*, 575 U.S. at 356, 191 L. Ed. 2d at 500. Moreover, “traffic stops remain[] lawful only so long as [unrelated] inquiries do not *measurably* extend the duration of the stop.” *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676 (alterations and emphasis in original) (citation and quotation marks omitted) (holding an officer’s frisk of the defendant, for safety reasons, lasting eight or nine seconds did not measurably extend the stop).

¶ 23 Here, Lieutenant Stone did not articulate any reasonable suspicion of other criminal activity to support his asking for Defendant’s consent to search. In fact, Lieutenant Stone stated he routinely asked for consent to a full search during traffic stops and taught other law enforcement officers to do the same. Thus, the pertinent inquiry is whether Lieutenant Stone’s asking Defendant for consent to search and the subsequent search measurably extended the stop’s duration rendering any consent Defendant gave involuntary as a matter of law. This inquiry, in turn, depends on whether the search deviated from the traffic stop’s mission. Certainly, a full search of Defendant’s person for any illegal contra-

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band was not related to the traffic stop based on a seatbelt infraction. However, officer safety is a part of every traffic stop's mission. *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676.

¶ 24 An officer is permitted to detain an individual when the officer has a reasonable suspicion criminal activity is afoot and may conduct an external frisk of the detained person if the officer has reason to believe the detainee is armed and potentially dangerous. *See State v. Duncan*, 272 N.C. App. 341, 347, 846 S.E.2d 315, 320-21 (2020) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 124 L. Ed. 2d 334, 343-44 (1993)). Thus, it may have been reasonable for Lieutenant Stone to conduct an external frisk of Defendant for officer safety as a part of the traffic stop's mission. Moreover, this traffic stop's mission could have included a check for outstanding warrants and of Defendant's license and registration. However, the length and scope of a full search, before any of those permissible checks were completed, measurably—and impermissibly—extended the traffic stop in this case.

¶ 25 Here, the video evidence shows approximately twenty-six seconds elapsed from the time Defendant appears to raise his arms and complies with the search and when Lieutenant Stone finished reaching into all Defendant's pockets. Moreover, the video reflects Lieutenant Stone never conducted an external frisk and possibly missed locations where Defendant could have concealed weapons instead focusing on the content of Defendant's pockets. Lieutenant Stone not conducting such a frisk belies his stated concern for his safety. Thus, although “a frisk that lasts just a few seconds[.]” and is conducted to enhance officer safety may not measurably extend a traffic stop, *Bullock*, 370 N.C. at 262-63, 805 S.E.2d at 677, the full search in this case lasting almost thirty seconds, and arguably not related to officer safety, did measurably extend the stop in this case. *See Duncan*, 272 N.C. App. at 353-54, 846 S.E.2d at 325 (a thirty-four-second “search into Defendant's jacket pockets had nothing to do with the ‘mission’ of the traffic stop” and measurably prolonged the stop).

¶ 26 Indeed, the State makes no argument that—absent Defendant's alleged consent—the search in this case would have been permissible under the Fourth Amendment. Rather, the State contends Lieutenant Stone's act of *requesting* consent to search did not measurably extend the traffic stop. However, as stated above, “[w]ithout additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment.” *Parker*, 183 N.C. App. at 9, 644 S.E.2d at 242 (citation omitted).

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¶ 27 Nevertheless, the State argues our decision in *State v. Jacobs* supports the State's position law enforcement officers need no additional, reasonable suspicion to request consent to search defendants during a valid traffic stop.³ 162 N.C. App. 251, 590 S.E.2d 437 (2004). In *Jacobs*, the defendant pled guilty to drug charges after the trial court denied the defendant's motion to suppress evidence of drug possession law enforcement found after stopping the defendant's car and asking defendant for consent to search the car. *Id.* at 252, 590 S.E.2d 439. An officer with the Burlington Police Department stopped the defendant's car at approximately 1:43 a.m. because the officer saw the defendant's car "continuously weaving back and forth in its lane[.]" *Id.* Beyond the defendant's "weaving," the defendant's car also had a Tennessee license plate; the officer had recently been alerted that a murder suspect from Tennessee was in Burlington. *Id.*

¶ 28 After the officer stopped the defendant's car, the officer "ordered [the] defendant out of the car and conducted a pat-down search to ensure [the] defendant was not armed." *Id.* The defendant's car was registered to a man with a different last name than the defendant, and the defendant stated the car was the defendant's brother's car, although he could not explain why the two had different last names. *Id.* at 252-53, 590 S.E.2d at 439. According to the officer, the defendant "appeared to be nervous[.]" *Id.* at 253, 590 S.E.2d at 439. The officer then told the defendant the officer "had information regarding the transport of drugs" between Tennessee and Burlington. *Id.* The officer asked the defendant if the defendant had any drugs in his car; the defendant replied he did not. *Id.* The officer asked the defendant for consent to search the car, and the defendant consented and told the officer there was a large amount of cash in the car "from the sale of a motorcycle." *Id.* As the officer searched the car, he smelled marijuana; the defendant admitted someone had smoked marijuana in the vehicle earlier. *Id.* at 253, 590 S.E.2d at 440. The officer found "a bundle of bills in a rubber band" and loose tobacco the officer believed came from hollowed-out cigars used to smoke marijuana. *Id.* The officer searched the defendant's person, including the defendant's "crotch," where the officer found plastic bags containing what the officer believed were methylenedioxymethamphetamine (MDMA) and marijuana. *Id.* at 253-54, 590 S.E.2d at 440.

3. The State makes this argument in opposing Defendant's argument the request for consent violated Art. I § 20 of the North Carolina Constitution. We address whether *State v. Jacobs* supports the State's position on Fourth Amendment grounds and do not address whether the request for consent in this case violated the North Carolina Constitution.

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¶ 29 On appeal, the defendant argued the trial court erred in denying his motion to suppress where, according to the defendant, the officer did not have reasonable suspicion for the stop, and the search of his car was unlawful, despite his consent, because “the length of the investigatory detention was unreasonable.” *Id.* at 254-56, 590 S.E.2d 440-41. First, we held the trial court did not err in concluding the officer had reasonable suspicion to stop the defendant because the officer observed the defendant “weaving” in his lane giving rise to reasonable suspicion of impaired driving. *Id.* at 255-56, 590 S.E.2d at 440-41. Further, we held the officer had reason to detain the defendant and ask him questions in order to dispel or confirm his suspicions about the Tennessee murder suspect and that the defendant’s inability to answer the officer’s questions and the defendant’s nervousness gave rise to additional suspicion. *Id.* at 256-57, 590 S.E.2d at 441-42.

¶ 30 In the alternative, the defendant argued the State “failed to establish that [the officer] had sufficient reasonable suspicion to request defendant’s consent for the search.” *Id.* at 258, 590 S.E.2d at 442. We concluded “[n]o such showing is required.” *Id.* We reasoned: “[w]hen a defendant’s detention is lawful, the State need only show ‘that defendant’s consent to the search was freely given, and was not the product of coercion’” *Id.* (quoting *State v. Sanchez*, 147 N.C. App. 619, 626, 556 S.E.2d 602, 608 (2001) *disc. rev. denied*, 355 N.C. 220, 560 S.E.2d 358 (2002) (citation omitted)). Thus, we held the search of the defendant’s car was lawful “[s]ince the search of defendant’s car was admittedly consensual and was not tainted by an unlawful detention.” *Id.* at 258, 590 S.E.2d at 443 (emphasis added).

¶ 31 However, *Jacobs* is inapposite here. In *Jacobs*, we held the defendant was already lawfully detained on suspicion of impaired driving. Thus, the officer in *Jacobs* already had reasonable suspicion to support a search for intoxicants in the defendant’s vehicle. Therefore, the request for consent to search did not constitute further, unlawful detention because the officer had reason to believe evidence of impairment could be present, and the defendant’s nervousness and inability to answer questions added to the officer’s suspicions. Here, unlike the officer in *Jacobs*, Lieutenant Stone had no reasonable suspicion of criminal activity unrelated to the initial reason for the traffic stop. Without any additional reasonable suspicion of unrelated criminal activity, Lieutenant Stone’s request for consent for a full search unreasonably delayed the stop and tainted the consent Defendant gave. *See id.*; *see also Parker*, 183 N.C. App. at 9, 644 S.E.2d at 242. Therefore, Lieutenant Stone had not lawfully detained Defendant such that the State only had to show Defendant’s

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consent was freely given and not the product of coercion. *See Jacobs*, 162 N.C. App. at 258, 590 S.E.2d at 442.

¶ 32 The State further argues our decision in *Parker*—restating the general proposition that a request for consent unrelated to the reason for the initial stop must be supported by reasonable suspicion of additional, criminal activity—“does not survive” our Supreme Court’s decision in *Bullock*. In *Parker*, however, we in fact held law enforcement’s request for consent to search was supported by probable cause where, during a valid “weapons frisk” of the vehicle just prior to the request for consent to search the defendant’s purse, law enforcement found other drugs and drug paraphernalia creating at least reasonable suspicion of further criminal activity unrelated to defendant’s speeding that caused law enforcement to stop the defendant’s vehicle in the first instance. *Parker*, 183 N.C. App. at 11-13, 644 S.E.2d at 243-44. In this case, based on Lieutenant Stone’s own testimony, he had no reasonable, articulable suspicion of any further criminal activity that would support his request for consent for a full search of Defendant’s person.

¶ 33 Moreover, our decision in *Parker* was left undisturbed by *Bullock* as *Bullock* was focused on how a frisk was related to the mission of the traffic stop generally. *See generally Bullock*, 370 N.C. 256, 805 S.E.2d 671. Indeed, the *Bullock* Court acknowledged: “Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop.” *Id.* at 258, 805 S.E.2d at 674. Here, the request to search and the full search of Defendant in this case was not related to the mission of the stop and wholly unsupported by any reasonable, articulable suspicion of other criminal activity afoot beyond the seatbelt infraction for which Lieutenant Stone initially stopped Defendant. Thus, because Lieutenant Stone’s request for consent and his subsequent search of Defendant measurably prolonged the traffic stop for reasons unrelated to the stop’s mission without reasonable suspicion, any consent Defendant gave for this full search was involuntary as a matter of law. Therefore, the trial court erred in denying Defendant’s Motion to Suppress the cocaine found as a result of this unreasonable search.⁴ Consequently, we reverse the trial court’s denial of Defendant’s

4. Alternatively, the trial court found Lieutenant Stone’s “actions were justified” under the “plain feel exception.” The trial court’s Finding/Conclusion the evidence in this case would have been admitted under the plain feel exception is not supported by the Record. The plain feel exception applies “to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search.” *Minnesota v. Dickerson*, 508 U.S. 366, 375; 124 L. Ed. 2d 334, 345 (1993). However, as explained above, the search in this case was not a lawful search. Moreover, even if the trial court assumed Lieutenant Stone

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Motion to Suppress. Moreover, we vacate the Judgment entered against Defendant based on his guilty pleas—entered subject to this appeal—to the charges of Felony Possession of Cocaine and the concomitant charge of attaining Habitual-Felon Status. We remand this matter to the trial court for further proceedings, including a determination of whether there is evidence to support the charges against Defendant or if these matters should be dismissed.

Conclusion

¶ 34 Accordingly, for the foregoing reasons, we reverse the trial court's denial of Defendant's Motion to Suppress, vacate the Judgment, and remand this matter for further proceedings.

VACATED AND REMANDED.

Judge CARPENTER concurs in a separate opinion.

Judge GRIFFIN concurs in a separate opinion.

CARPENTER, Judge, concurring.

¶ 35 I concur with the reasoning and the outcome that the application of the Constitutional protections to this case requires. I join the narrow analysis of the dispositive constitutional issue in this case set forth by Judge Griffin in his concurrence. I write separately to highlight that the legality of the stop of Appellant's vehicle was not challenged on appeal and there is no indication in the record in this case that racially disparate treatment was at issue.

¶ 36 Choosing to inject arguments of disparate treatment due to race into matters before the Court where such treatment is not at issue and does not further the goal of the equal application of the law to everyone. Rather, such a discussion functions to overshadow the other important constitutional issues of this case, and is not helpful to maintaining public confidence in the judiciary or the practice of law generally.

would have immediately recognized the contraband during an external frisk, nothing in the Record supports such an assumption. Lieutenant Stone did not know there was anything in Defendant's pockets until he reached inside them. As such, the plain feel exception does not apply in this case. See *State v. Beveridge*, 112 N.C. App. 688, 696, 436 S.E.2d 912, 916 (1993), *aff'd per curiam*, 336 N.C. 601, 444 S.E.2d 223 (1994) (declining to apply the plain feel exception where the officer conducted an external frisk and then exceeded the scope of that permissible frisk by asking the defendant to empty the contents of his pockets and where the officer's testimony did not establish the object was immediately recognizable as contraband during the frisk).

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GRIFFIN, Judge, concurring.

¶ 37 I concur with the reasoning in the majority opinion. I write separately to indicate exactly where Lieutenant Stone violated the Fourth Amendment to the U.S. Constitution. The Defendant's brief also raises a question of impartiality in traffic stops, and our justice system generally, based on the color of a person's skin and their gender. This appeal to an emotion, and to nothing before us in the Record, must be addressed, as the law applies equally to everyone. This case presents a very specific set of facts to guide our analysis. The stop of Defendant's vehicle was supported by reasonable suspicion. "[R]easonable suspicion is the necessary standard for traffic stops[.]" *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (citation omitted). Lieutenant Stone plainly articulated that he observed Defendant driving the vehicle without wearing a seatbelt. Defendant does not challenge on appeal the validity of the initial traffic stop.

¶ 38 Lieutenant Stone could and did lawfully ask Defendant to get out of the vehicle for safety reasons.

[A] police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle. . . . Asking a stopped driver to step out of his or her car improves an officer's ability to observe the driver's movements and is justified by officer safety, which is a legitimate and weighty concern.

State v. Bullock, 370 N.C. 256, 261-62, 805 S.E.2d 671, 676 (2017) (citations and internal quotation marks omitted). A traffic stop is anything but routine and can present any number of challenges to an officer and the individual stopped. An officer is authorized to take many investigatory and safety-related measures. Additionally, Lieutenant Stone could have checked for outstanding warrants, checked Defendant's driver's license, and inspected the vehicle registration. *Id.* at 257, 805 S.E.2d at 673. An officer can, and should, take officer safety into account during a traffic stop. *Id.* at 258, 805 S.E.2d at 674.

¶ 39 The issue in this case arises when Lieutenant Stone asks to search Defendant with no additional reasonable suspicion of other criminal activity. The only violation evident from the Record is the seatbelt violation. Here, Lieutenant Stone's testimony was clear that his intent was to search Defendant. The evidence in the Record supports this. The video of the interaction between Lieutenant Stone and Defendant cuts against an assertion that the search was for officer safety. Further, the trial court

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made no findings regarding officer safety concerns. The search was administered only in the pockets of Defendant. There was no pat down frisk. Lieutenant Stone reached directly into Defendant's pockets and did not search other areas of Defendant's person where weapons could be hidden. The evidence here does not indicate that the search was motivated by a concern for officer safety. Lieutenant Stone even stated that he asked to search "every single person that I stop" and that for years he had been training new deputies to "ask to search" people that they stop. An officer can certainly ask for consent to search an individual after a lawful detention. However, under this specific set of facts, this search prolonged the mission of the stop in violation of the Fourth Amendment. *See Rodriguez v. United States*, 575 U.S. 348, 355 (2015) (holding a traffic stop "remains lawful only so long as [unrelated] inquiries do not measurably extend the duration of the stop" (alteration in original) (citation and internal quotation marks omitted)). Lieutenant Stone articulated no additional reasonable suspicion of criminal activity for asking to search Defendant, thereby illegally delaying the stop. *See id.* (stating an officer "may not [conduct unrelated checks] in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual" (citation omitted)).

¶ 40 The analysis here does not limit or question the officer's ability to take safety precautions as articulated in *Bullock*. It also does nothing to limit a search pursuant to consent. If Lieutenant Stone had reasonable articulable suspicion of other criminal activity or had received valid consent for an additional search, the additional search would not have violated the Fourth Amendment by extending the encounter. *See State v. Reed*, 373 N.C. 498, 510, 838 S.E.2d 414, 423 (2020) (stating that "prolong[ing] a detention beyond the scope of a routine traffic stop requires . . . either the driver's consent or a reasonable suspicion that illegal activity is afoot" (citation and internal quotation marks omitted)).

¶ 41 Defendant's brief implies that U.S. citizens are treated differently under our laws based on the color of their skin. I reject this argument. The law is color blind and applies equally to every citizen in the United States of America. This argument in Defendant's brief is inflammatory and unnecessary.

¶ 42 It is hard to blame Defendant for raising this argument. The brief quoted former North Carolina Chief Justice Beasley, who also implied in a speech on 2 June 2020 that our justice system does not treat people equally in the courtroom based on the color of their skin:

These protests highlight the disparities and injustice that continue to plague black communities. Disparities

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that exist as the result of policies and institutions; racism and prejudice have remained stubbornly fixed and resistant to change. These protests are a resounding, national chorus of voices whose lived experiences reinforce the notion that Black people are ostracized, cast out, and dehumanized. Communities are crying out for justice and demanding real, meaningful change.

...

As the mother of twin sons who are young black men, I know that the calls for change absolutely must be heeded. And while we rely on our political leaders to institute those necessary changes, we must also acknowledge the distinct role that our courts play. As Chief Justice, it is my responsibility to take ownership of the way our courts administer justice, and acknowledge that we must do better, we must be better.

When Chief Justice Martin convened a commission to study the justice system in 2015, that commission found that a majority of North Carolinians lack trust and confidence in our court system. Too many people believe that there are two kinds of justice. They believe it because that is their lived experience – they have seen and felt the difference in their own lives.

The data also overwhelmingly bears out the truth of those lived experiences. In our courts, African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty. There are many ways to create change in the world, but one thing is apparent: the young people who are protesting everyday have made clear that they do not intend to live in a world in which they are denied justice and equality like the generations before them.

We must develop a plan for accountability in our courts. Judges work hard and are committed to serving the public. But even the best judges must be trained to recognize our own biases. We have to be experts not just in the law, but in equity, equity that recognizes the difficult truths about our shared

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past. We must openly acknowledge the disparities that exist and are too often perpetuated by our justice system.

...

Our pilot projects in eight North Carolina counties are already showing promising results that can be implemented statewide to truly bring change to a system that all too frequently punishes people disparately.

Cheri Beasley, *Chief Justice Beasley Addresses the Intersection of Justice and Protests around the State*, North Carolina Judicial Branch (June 2, 2020), <https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state>.

¶ 43 This statement from the former Chief Justice has motivated Defendant in this case to assert that “[o]ur Constitution gives this Court the legal authority to carry out our Chief Justice’s pledge.” Defendant’s statement highlights the problem with the judiciary becoming involved in public policy. The speech by the former Chief Justice states our justice system does not treat people equally based on the color of their skin. It also encourages and charges the courts to become an active body by involving our judicial branch in policy decisions. The judiciary should at all times practice judicial restraint. Here, this Court reaches the correct legal outcome regardless of the color of Defendant.

¶ 44 We are fortunate to live in the United States of America where the law is applied the same to all citizens.

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STATE OF NORTH CAROLINA

v.

JENNIFER LYNN PIERCE, DEFENDANT

No. COA20-494

Filed 21 September 2021

1. False Pretense—“person within this State”—corporate victim—sufficiency of evidence

In a prosecution for obtaining property by false pretenses, assuming without deciding that “person within this State” (pursuant to N.C.G.S. § 14-100, referring to a victim) is an essential element of the offense, the State nevertheless met this requirement by presenting evidence that the large quantity of cell phones defendant ordered from a corporation at a discount, on the pretense that the phones were for a non-existent charity, were shipped to one of the corporation’s retail stores located in North Carolina and that one of the corporation’s agents met with defendant’s collaborator in various North Carolina locations.

2. False Pretense—valuation of property—to elevate felony—fair market value—sufficiency of evidence

In a prosecution for obtaining property by false pretenses in which defendant obtained a large quantity of cell phones at a discount on behalf of a non-existent charity with plans to resell the phones at the full retail value, the State presented substantial evidence, including actual fraud loss values, from which a jury could conclude that the value of the property obtained—meaning fair market value—was \$100,000.00 or more, elevating each of four counts to a Class C felony pursuant to N.C.G.S. § 14-100(a), regardless of any amount defendant may have paid when obtaining the phones.

Appeal by Defendant from judgment entered 16 September 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

Mark L. Hayes for defendant-appellant.

MURPHY, Judge.

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¶ 1 A trial court does not err in denying a defendant's motion to dismiss where the State presented substantial evidence, when viewed in the light most favorable to the State, of each essential element of the crime charged. Here, presuming, without deciding, the phrase "person within this State" is an essential element of obtaining property by false pretenses under N.C.G.S. § 14-100(a), the State presented substantial evidence that the victim was a person within this State. The State also met its burden to show the gross value of the property obtained under false pretenses was \$100,000.00 or more in each timeframe supporting the four separate convictions. We discern no error.

BACKGROUND

¶ 2 In 2006, Defendant Jennifer Lynn Pierce employed Brian Knight¹ at her telemarketing business. In 2008, Knight left Defendant's company and went back to school to become a police officer. Around 2010 or 2011, Knight acquired two convenience stores, including one that was attached to a Marathon gas station. In 2015, the North Carolina Department of Revenue seized both convenience stores due to Knight falling behind on paying the stores' taxes. At that time, Knight and Defendant reconnected with each other.

¶ 3 After Knight explained his financial struggles to Defendant, she offered to help. Defendant told Knight she could use his name and his convenience store businesses to purchase phones at a discount from AT&T² and resell them at full retail value, a scheme that ultimately came to be known as the Merry Marathon project. Using Knight's personal and business information, Defendant represented to AT&T that Merry Marathon was a charity associated with Knight's convenience store attached to the Marathon gas station and the charity needed a large quantity of Apple iPhones³ for telemarketing purposes.

¶ 4 Knight testified the iPhones were sent to his business, and he brought them to Defendant, after which he was "not quite sure" what happened to them. However, Knight knew the iPhones would leave Defendant's possession and he would get money in return. AT&T's fraud team began to suspect illegal behavior and gathered information regarding the billing and transaction records for the Merry Marathon account.

1. Knight was also charged for his roles in the alleged criminal activities.

2. For ease of reading, and which is made more clear in note 8, *infra*, we refer to "AT&T" generically, as it appears in the indictments, throughout this opinion.

3. Defendant also ordered a small number of tablets, but the majority of the items she ordered and obtained were iPhones.

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This information was passed along to the United States Secret Service, as well as the North Carolina Secretary of State's Office.

¶ 5 Defendant was indicted on five counts⁴ of obtaining property by false pretenses valued at \$100,000.00 or more and two charges of accessing government computers to defraud.⁵ The obtaining property by false pretenses valued at \$100,000.00 or more charges were identified by shipping date, and the gross value of the goods falsely obtained for count one was \$110,547.99 from 28 July 2014 to 29 August 2014; \$162,797.04 from 16 September 2014 to 17 September 2014 for count two; \$116,047.93 on 22 September 2014 for count three; and \$131,597.74 from 23 September 2014 to 22 October 2014 for count four. The indictments each alleged:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or between [the alleged dates], in Wake County, [Defendant] unlawfully, willfully, and feloniously did knowing and designedly with the intent to cheat and defraud, obtain Apple iPhones from AT&T by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: [Defendant] pretended to operate a charity when in fact the charity was non-existent. [Defendant] entered into an agreement with AT&T to purchase Apple iPhones for the fraudulent charity and make payments. [Defendant] then failed to make payments on the agreement and sold the devices for cash. At the time [Defendant] knew that the charity did not exist. The value of the iPhones was greater than \$100,000.00.[⁶] This act was done in violation of [N.C.G.S.] § 14-100 and against the peace and dignity of the State.

¶ 6 At trial, the State presented testimony from AT&T's senior fraud case manager, Pam Tyler. Tyler's testimony explained and discussed State's

4. At the close of the State's evidence, the State dismissed one count of obtaining property by false pretenses valued at \$100,000.00 or more, leaving the remaining four counts to go to the jury.

5. The two accessing government computers to defraud charges are not part of this appeal.

6. We note the indictments, in alleging the Class C felony as opposed to the Class H felony, improperly reference the value of the falsely obtained goods as "greater than \$100,000.00" when the statute only requires the "value is one hundred thousand dollars (\$100,000[.00]) or more[.]" N.C.G.S. § 14-100(a) (2019). This defect in the indictment was not fatal and did not deprive the trial court of subject matter jurisdiction.

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Exhibit #1, which was a spreadsheet with information about the Merry Marathon project, including what type of iPhones were purchased, the dates the iPhones were purchased, the addresses the iPhones were shipped to, and the dollar figures for the “sale price” and the “actual fraud loss.” Tyler testified the “sale price” column represented “what [AT&T] would charge the customer.” She further clarified that, in this case, “[b]ecause of [the] large sale, they -- it looks like [Defendant] worked out a deal with [AT&T] where they got [] what we call a subsidized price on the phones, but there’s an *actual retail value* of the phone that AT&T or any carrier actually pays” to buy the iPhones from the supplier. (Emphasis added). Tyler testified the dollar figure in the “actual fraud loss” column represented “the actual value of each [iPhone.] . . . the actual price.” Tyler also testified some payments had been made, but she “[did not] have that figure.” She stated “there were [] some [] payment reversals[,]” meaning “[t]he check didn’t clear or was reversed by the financial institution.”

¶ 7 A jury found Defendant guilty of all four counts of obtaining property by false pretenses valued at \$100,000.00 or more and guilty of the two charges of accessing government computers to defraud. Defendant received a consolidated active sentence of 100 to 132 months on the obtaining property by false pretenses valued at \$100,000.00 or more convictions and a consecutive consolidated active sentence of 20 to 33 months on the accessing government computers with the intent to defraud convictions. Defendant verbally gave notice of appeal.

ANALYSIS

¶ 8 Defendant argues the trial court erred when it denied her motion to dismiss because there was not substantial evidence of each essential element of obtaining property by false pretenses under N.C.G.S. § 14-100. Specifically, Defendant argues (A) “[t]he State presented no evidence that [the victim of the crime] was a ‘person within this State,’ ” and (B) “[t]he State presented no evidence upon which a jury could conclude that the property [obtained under false pretenses] was worth more than \$100,000[.00].”

¶ 9 N.C.G.S. § 14-100 defines the crime of obtaining property by false pretenses:

(a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State

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any money, goods, property, services, chose in action or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action, or other thing of value, such person shall be guilty of a felony[.] . . . If the value of the money, goods, property, services, chose in action, or other thing of value is one hundred thousand dollars (\$100,000[.00]) or more, a violation of this section is a Class C felony. If the value of the money, goods, property, services, chose in action, or other thing of value is less than one hundred thousand dollars (\$100,000[.00]), a violation of this section is a Class H felony.

. . . .

(c) For purposes of this section, “person” means person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization.

N.C.G.S. § 14-100 (2019).

¶ 10 “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Upon [the] defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant’s being the perpetrator of such offense. If so, the motion is properly denied.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33. “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

A. “Person Within this State”

¶ 11 [1] Defendant argues “[b]y the plain language of [N.C.G.S.] § 14-100, it is an essential element of the crime that the victim is a ‘person within this

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State’ ” and the State failed to meet its burden in proving this element of the crime. Our research reveals that this is an argument that has not been addressed by our appellate courts and initially we note that our caselaw has consistently observed the essential elements to the offense of obtaining property by false pretenses under N.C.G.S. § 14-100 are: “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *see also State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); *State v. Hallum*, 246 N.C. App. 658, 664, 783 S.E.2d 294, 299, *disc. rev. denied*, 368 N.C. 919, 787 S.E.2d 24 (2016).

¶ 12 This is an issue of first impression;⁷ however, we need not address whether “person within this State” is an essential element of obtaining property by false pretenses because, even if it is, the element has been satisfied here. Knight testified the iPhones were shipped to an AT&T store that operated out of Greenville, and AT&T’s agent also relinquished possession of iPhones in Wilson and Goldsboro⁸:

7. The law covering the King of England’s realm in 1757 did not include a geographical restriction. The first time a law was enacted in North Carolina which included any potential geographical restriction was when the General Assembly included “within this state” in the statute codified as Potter’s Revisal of 1819, laws of 1821, Ch. 814 § 2. *Compare* 30 Geo. II, ch. 24, § 1 (emphasis added) (“That from and after the twenty ninth day of September one thousand seven hundred and fifty seven, all persons who knowingly and designedly, by false pretence or pretences, *shall obtain from any person or persons*, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same . . .”) *with* 1811, c. 814, § 2, P.R. (emphasis added) (“That from and after the passing of this act, if any person or persons shall knowingly and designedly, by means of any forged or counterfeit paper, in writing or in print, or by any false token or other false pretence or pretences whatsoever, *obtain from any person or persons, or corporation within this state*, any money, goods, property or other thing of value, or any bank note, check, or order for the payment of money issued by or drawn on any bank or other society . . .”).

8. On appeal, for the first time, Defendant posits that AT&T is made up of various different subsidiaries, including AT&T, Inc., AT&T Operations, Inc., AT&T Wireless Services, Inc., AT&T Corp., and AT&T Mobility, LLC, and argues “even if a corporation becomes ‘a person within this State’ by the presence of any of its stores, the State presented no evidence that this AT&T store was owned or operated by the AT&T corporation which was the victim in this case. . . . One cannot automatically assume that one AT&T entity is ‘within this State’ just because another AT&T entity is ‘within this State[.]’ ” We interpret Defendant’s argument to be a fatal variance argument regarding which entity is the actual victim of the crime. *See State v. Fink*, 252 N.C. App. 379, 386-87, 798 S.E.2d 537, 542 (2017) (finding no fatal variance where the indictment referred to the corporation as “Precision Auto Care, Inc.” and the evidence at trial tended to show the corporation’s name was “Precision Franchising, Inc.”). As Defendant’s motion to dismiss was based solely on the

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[THE STATE:] Okay. The phones that were being sent and shipped by AT&T as part of this Merry Marathon project, where were they being sent to? Where were you receiving them?

[KNIGHT:] Different – some – some were sent to this – my location in Wilson, which was a Marathon store, just like the account was – was addressed under and some were given to me, brought to me by Tracy who was my account manager from AT&T. She would bring them to me sometimes. So just, you know, if she brought them – she brought them to me sometimes, sometimes they were shipped to the store in boxes.

[THE STATE:] Okay. That Tracy, is that Tracy Fryer Williams?

[KNIGHT:] That's correct.

[THE STATE:] And she was an AT&T employee in Greenville?

[KNIGHT:] Right. She was like a business specialist which she didn't particularly work inside in one location. Sometimes I would meet her in Wilson, she would meet at that location. And sometimes it was Greenville and also Goldsboro, so . . .

[THE STATE:] Okay. And some times when you met she would actually deliver you some of these phones as part of the Merry Marathon project?

[KNIGHT:] That's correct.

[THE STATE:] Okay. And then you said a bunch or many of them came to your actual Marathon store in Wilson.

[KNIGHT:] Right.

grounds of insufficient evidence and not on the grounds of a fatal variance, it was not properly preserved for appellate review. *See State v. Everett*, 237 N.C. App. 35, 40, 764 S.E.2d 634, 638 (2014) (citations omitted) (“To preserve a fatal variance argument for appellate review, a defendant must state at trial that an allegedly fatal variance is the basis for his motion to dismiss. At trial, [the] [d]efendant based his motion to dismiss solely on the grounds of insufficient evidence. Therefore, [the] [d]efendant did not properly preserve for appellate review his argument that there was a fatal variance . . .”). Therefore, we do not consider this portion of Defendant's argument in our resolution of this appeal.

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[THE STATE:] Each time that you received phones either from Tracy or that were shipped to your store, what did you do with them?

[KNIGHT:] I would take them straight to Raleigh.

[THE STATE:] Where would you go in Raleigh with them?

[KNIGHT:] I would go to [Defendant's] house on San Gabriel in Raleigh. I would leave them with her. And after that I'm not sure where they went.

¶ 13 Presuming, without deciding, that “person within this State” is an essential element to the offense of obtaining property by false pretenses, a reasonable mind could conclude AT&T was operating as a “person within this State” from the above-quoted testimony; the falsely obtained iPhones came from a store operated by the victim, AT&T, located in North Carolina. The State presented substantial evidence from which a reasonable mind could conclude that AT&T is a “person within this State.” N.C.G.S. § 14-100(a) (2019) (“If any person shall . . . obtain or attempt to obtain from any person within this State . . .”). The trial court properly denied Defendant’s motion to dismiss on this basis.

B. Valuation of the Property Obtained by False Pretenses

¶ 14 [2] Defendant also argues the trial court erred in denying her motion to dismiss because the State did not meet its burden to present evidence that the value of the iPhones falsely obtained by Defendant in each time period was at least \$100,000.00. Accordingly, Defendant argues she should have only been convicted of four Class H felonies, as opposed to four Class C felonies. *See* N.C.G.S. § 14-100(a) (2019) (“If the value of the [goods falsely obtained] is one hundred thousand dollars [] or more, a violation of this section is a Class C felony. If the value of the [goods falsely obtained] is less than one hundred thousand dollars [], a violation of this section is a Class H felony.”).

¶ 15 Our caselaw has not defined the term “value” in the context of N.C.G.S. § 14-100(a). However, our caselaw has defined the term “value” in the context of property crimes to be synonymous with “fair market value.” *See State v. Shaw*, 26 N.C. App. 154, 157, 215 S.E.2d 390, 392-93 (1975) (citations omitted) (“As used in [N.C.G.S. §] 14-72(a) for determining whether the crime is a felony or a misdemeanor, the word ‘value’ means the fair market value of the stolen item at the time of the theft. In the case of common articles having a market value, the courts . . . have declared the proper criterion to be the price which the subject of the

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larceny would bring in open market—its ‘market value’ or its ‘reasonable selling price’, at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny[.]”); *State v. Cook*, 263 N.C. 730, 736, 140 S.E.2d 305, 310 (1965) (“The word ‘value,’ as used in the [grand larceny] statute, does not mean the price at which the owner would sell, but means . . . fair market value.”). We hold that this reasoning is persuasive and that the term “value,” as used in N.C.G.S. § 14-100, means fair market value of the item at the time it was falsely obtained.

¶ 16 To this end, Defendant also argues “[t]he State’s evidence concerning the original purchase prices and subsidized retail prices of the phones is insufficient to establish the fair market value of the phones.” We disagree.

¶ 17 “A verdict or finding as to value may be based on evidence of the price which the owner had paid for [the] property shortly before its theft” *Shaw*, 26 N.C. App. at 158, 215 S.E.2d at 393. The jury was provided with State’s Exhibit #1, a spreadsheet containing dollar figures in a column labeled “actual fraud loss.” Tyler testified the actual fraud loss value represents the actual retail value of the iPhone, not the price AT&T charges the customer. The jury was free to either consider these values or not consider them in determining the iPhones’ fair market value, and whether it considered them does not affect the outcome of our analysis. *See State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975) (“What the evidence proves or fails to prove is a question of fact for the jury.”); *State v. Blagg*, 2021-NCSC-66, ¶ 11 (marks omitted) (“Courts considering a motion to dismiss for insufficiency of the evidence should not be concerned with the weight of the evidence.”). Based on Tyler’s testimony, a reasonable mind could have interpreted State’s Exhibit #1 as representing the prices which AT&T had paid to its supplier for the iPhones before Defendant falsely obtained them. There was sufficient evidence presented to the jury to allow it to conclude the fair market value of the iPhones was equivalent to the “actual fraud loss” figures in State’s Exhibit #1.

¶ 18 Defendant also argues even if the actual fraud loss figure could be construed as the fair market value of the iPhones, “[t]he jury could not calculate the value of the falsely-obtained property without knowing the value of the payments [made by Defendant] for that property.”

¶ 19 At trial, Tyler testified to the following on cross-examination:

[DEFENSE COUNSEL:] Okay. And how much payment did [AT&T] actually receive on [the Merry Marathon] accounts?

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[TYLER:] I don't know. There [were] some deposits, payments made, and I don't have that figure.

[DEFENSE COUNSEL:] You understand -- maybe you don't -- do you understand that part of this offense deals with how much -- one of the elements is the amount that [AT&T is] out of pocket?

[TYLER:] We have that document -- what we put as a loss is what we lost.

[DEFENSE COUNSEL:] Okay. How much was paid, because the phones that you get for free, correct, I mean, something was paid to get them?

[TYLER:] They paid deposits on some of the accounts. And there were also some reversals, payment reversals.

[DEFENSE COUNSEL:] What does that mean?

[TYLER:] The check didn't clear or was reversed by the financial institution.

¶ 20 Defendant relies on *State v. Kornegay* to assert that “[b]ecause large payments for the phones were paid, the obtained property consists of only a portion of the devices’ overall fair market values.” See *State v. Kornegay*, 313 N.C. 1, 326 S.E.2d 881 (1985). Defendant misconstrues our Supreme Court’s recitation of an exercise of prosecutorial discretion in its preliminary statement for *Kornegay* as substantive law. *Id.* at 6, 326 S.E.2d at 887; see *Henderson v. Wilmington*, 191 N.C. 269, 278, 132 S.E. 25, 30 (1926) (“Upon this question the appeal was prosecuted; not upon that of levying a tax or pledging the credit of the city. The reference in the reported case to municipal wharves as ‘public necessities’ appears incidentally in the preliminary statement. It is not a part of the opinion; so it cannot be accepted as a precedent or as the expression of the Court.”).

¶ 21 In *Kornegay*, the defendant, an attorney, obtained a settlement for his client in which she had to pay \$104,000.00. *Kornegay*, 313 N.C. at 8, 326 S.E.2d at 889. The defendant falsely represented to his client that he settled the suit for \$125,000.00 and instructed his client to bring him a check in the amount of \$125,000.00. *Id.* at 28, 326 S.E.2d at 901. The defendant’s client delivered him a check in the amount of \$125,000.00, the defendant tendered a check for the settlement in the amount of \$104,000.00, and the defendant kept the remaining \$21,000.00

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for himself. *Id.* The defendant was indicted and charged with obtaining \$21,000.00 from his client by false pretense. *Id.* The information from *Kornegay* that Defendant relies on is merely a recitation of what the defendant was charged with, and not even dicta, much less a holding from our Supreme Court.

¶ 22 Despite Defendant's reliance on a premise not found in our substantive body of law, her argument and other hypotheticals are not without logic or reason. In her brief, Defendant argues:

This Court has not previously addressed how to calculate the value of falsely obtained "money, goods, property, services, chose in action, or other thing of value" when that item of value is part of a greater asset. For example, if a perpetrator purchased a \$100,000[.00] bar of gold using one valid cashier's check for \$95,000[.00] and a second forged cashier's check for \$5,000[.00], then the victim has only been swindled out of \$5,000[.00]. The falsely-obtained property is the \$5,000[.00] interest in the gold bar, not the entire \$100,000[.00] gold bar. On those facts, the perpetrator would be guilty of a Class H felony, not a Class C felony.

However, we hold that *State v. Hines* is more applicable to the facts of this case. *State v. Hines*, 36 N.C. App. 33, 243 S.E.2d 782, *appeal dismissed and disc. rev. denied*, 295 N.C. 262, 245 S.E.2d 779 (1978).

¶ 23 In *Hines*, we discussed the purpose of N.C.G.S. § 14-100:

A careful examination of [N.C.G.S. §] 14-100 reveals that the essence of the crime is the intentional false pretense – not the resulting economic harm to the victim. A civil action for damages would be the proper vehicle for remedying any pecuniary loss. The gravamen of the criminal offense, however, is making the false pretense and, thereby, obtaining another person's property or services. *The simple purpose of [N.C.G.S. §] 14-100 is to prevent persons from using false pretenses to obtain property. The ultimate loss to the victim, therefore, is an issue which is irrelevant to the purpose of the criminal statute and is an issue properly within the province of the civil courts.*

. . . . The criminal law cannot and should not rush to the aid of every citizen who strikes a bad bargain.

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The criminal law, however, is the proper mechanism to ensure that goods and services are freely surrendered and not taken away, irrespective of the economic realities. Thus, theft is punished even if the property stolen is worthless on the open market. . . .

Therefore, we hold that a defendant can be convicted of obtaining goods by false pretenses in violation of [N.C.G.S. §] 14-100 even though some compensation is paid

Id. at 42, 243 S.E.2d at 787-88 (emphasis added) (citation omitted).

¶ 24 Under the reasoning of *Hines*, the intent of N.C.G.S. § 14-100 is to focus on the act of the false pretense and the perpetrator's intent to deceive, not on any particular economic damage to the victim. Any payment that may or may not have been made toward the iPhones that were falsely obtained is irrelevant for resolution of this issue.

¶ 25 While *Kornegay* could have presented an opportunity for our Supreme Court to overturn our reasoning in *Hines*, it did not do so. *Kornegay* did not deal with the issue of net valuation or setoffs; rather, it only recognized the defendant's procedural posture.⁹ *Hines* establishes that we are only concerned with the gross fair market valuation of the property obtained, not the net gain in value to the criminal.¹⁰

¶ 26 The State presented substantial evidence from which the jury could conclude the gross fair market value of the property falsely obtained was \$100,000.00 or more. The trial court did not err in denying Defendant's motion to dismiss on this basis.

CONCLUSION

¶ 27 Presuming, without deciding, that the phrase "person within this State" is an essential element of N.C.G.S. § 14-100, the State presented

9. We further note Defendant makes no other arguments related to the theory of the case pursued by the State at trial to undercut the applicability of *Hines* and "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

10. This interpretation of *Hines* is further supported by the potential setoff being otherwise considered by the General Assembly. N.C.G.S. § 15A-1340.16 lays out a number of mitigating factors to be considered in *sentencing*, including "[t]he defendant has made substantial or full restitution to the victim." N.C.G.S. § 15A-1340.16(e)(5) (2019). N.C.G.S. § 15A-1340.16(e)(5) recognizes potential payments as a mitigating factor, but not as part of the substantive crime.

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sufficient proof regarding the element. In addition, the State presented sufficient evidence for the jury to conclude the value of the goods that were falsely obtained was \$100,000.00 or more to support each of the four indictments. The trial court did not err in denying Defendant's motion to dismiss the Class C felonies.

NO ERROR.

Judges TYSON and JACKSON concur.

BRUCE TAYLOR AND SUSAN TAYLOR, PLAINTIFFS-APPELLANTS
v.
THOMAS HIATT, THOMAS R. HIATT AND JEWEL HOLLARS, DEFENDANTS-APPELLEES

No. COA20-322

Filed 21 September 2021

Easements—gates erected—gravel road across neighboring property—unreasonable interference

In a dispute between neighboring landowners, where plaintiffs erected gates across a portion of a gravel road on their property through which defendants had an easement, the trial court properly ordered plaintiffs to remove the gates because, although the gates were necessary to the plaintiffs' reasonable enjoyment of their agricultural land (by helping to contain plaintiffs' horses), they unreasonably interfered with defendants' easement rights (defendants had to open the gates by typing a code on a temperamental, inconveniently located keypad that sometimes locked defendants out, the gates malfunctioned in cold weather, and plaintiffs' horses sometimes blocked the gates). However, the portion of the court's judgment declaring that plaintiffs had no right at all to erect gates across the easement was modified to allow plaintiffs to erect gates provided that they did not unreasonably interfere with defendants' easement rights.

Appeal by Plaintiffs from judgment entered 24 October 2019 by Judge D. Thomas Lambeth, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 12 May 2021.

Geoffrey K. Oertel for the Plaintiffs-Appellants.

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Timothy W. Gray for the Defendants-Appellees.

DILLON, Judge.

I. Background

¶ 1 Plaintiffs, Bruce and Susan Taylor, own a tract of land in Alamance County. Defendants, Thomas Hiatt, his son Thomas R. Hiatt, and his son's partner Jewel Hollars, own a tract of land adjacent to Plaintiffs' tract.

¶ 2 Defendants have easement rights to a gravel road that extends across Plaintiffs' tract from Defendants' tract to a public road. A dispute arose between the parties regarding the rights of the parties to the gravel road after Plaintiffs erected gates across the gravel road.

¶ 3 The present appeal is the second appeal of this matter to our Court.

¶ 4 Prior to the first appeal, the trial court granted Defendants' summary judgment, concluding that Plaintiffs were prohibited "from having any gates, bars, fences and the like upon [the easement]." Plaintiffs appealed that judgment. Our opinion in the first appeal is reported at *Taylor v. Hiatt*, 265 N.C. App. 665, 829 S.E.2d 670 (2019). There, we recognized that a portion of the easement was created in 1986 and that another portion of the easement was created in 2000. We further recognized that, based on the language used in the instruments granting the easement rights:

- (1) Plaintiffs have no right to erect any gate over the portion created in 1986, as that grant contained language that the easement was to stay open; and
- (2) Plaintiffs have the right to erect gates across the portion of the easement created in 2000, as that grant contained no language requiring that the easement remain "open." However, Plaintiffs' right is limited to erect gates on this portion "when necessary to the reasonable enjoyment of" their tract *and* provided that said gates "are not of such nature as to materially impair or unreasonably interfere" with the purpose of Defendants' easement rights. *Chesson v. Jordan*, 244 N.C. 289, 293, 29 S.E.2d 906, 909 (1944).

We held that summary judgment was not appropriate, as there was no evidence before the trial court showing *where* along the gravel road Plaintiffs had erected their gates. That is, there was no evidence showing

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whether the gates were erected on the portion created in 1986 or whether they were erected on the portion created in 2000. We remanded for further proceedings.

¶ 5 On remand, the trial court conducted a bench trial. At the trial's conclusion, the trial court entered its judgment, ordering Plaintiffs to remove the gates, declaring that "Plaintiffs are prohibited from installing gates across the road used by the Defendants[.]" Plaintiffs appeal from that judgment.

II. Analysis

¶ 6 When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law are supported by those findings. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 583, 347 S.E.2d 25, 28 (1986).

¶ 7 The trial court found that the gates were erected on the portion of the easement that was created in 2000, where the instruments creating those easements do *not* contain a requirement that the easements remain "open." This finding is not challenged on appeal. Notwithstanding, the trial court ordered Plaintiffs to remove the gates, concluding that Plaintiffs did not have the right to erect gates on any part of the easement. We address each part of the trial court's order.

A. Removal of Existing Gates

¶ 8 We affirm the portion of the trial court's order directing Plaintiffs to remove the existing gates. The seminal case upon which we rely is *Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d 906 (1944). In that case, our Supreme Court explained that a private easement "carries with it no implication of a right to deprive the owner of the servient estate of the full enjoyment of his property" and "it is subject only to the right of passage." *Id.* at 293, 29 S.E.2d at 909. Accordingly, the estate owner "may erect gates across the way when [1] necessary to the reasonable enjoyment of his estate, [2] provided they are not of such nature as to materially impair or unreasonably interfere with the use of the lane as a private way for the purposes for which it has theretofore been used." *Id.* at 293, 29 S.E.2d at 909.

¶ 9 In its judgment, the trial court determined that Plaintiffs did not satisfy either of the two prongs necessary to establish a servient tract owner's right to erect gates on an easement created for the benefit of another. We address each prong below.

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1. Reasonable Use and Enjoyment

¶ 10 As to the first prong, the trial court determined that “the gates erected by the Plaintiffs are not necessary to the Plaintiffs’ reasonable enjoyment of their estate.” Plaintiffs argue that the gates are an integral component of their fencing system necessary to contain horses on their agricultural land. We agree with Plaintiffs.

¶ 11 The undisputed facts in this case include that Plaintiffs use their tract for agricultural purposes (for keeping horses) that the Plaintiffs have fenced in their tract, and that the Plaintiffs have erected the gates to prevent their horses from escaping. Our Supreme Court has recognized that this type of use is reasonable:

Plaintiff uses his land for agricultural purposes which requires fencing. To prohibit the erection of gates would deprive him of the reasonable use of his land.

Id. at 293, 29 S.E.2d at 909. Other jurisdictions have likewise determined that a reasonable use of property includes the installation of gates on an easement by the owners of the servient estate for the purpose of containing their grazing animals.¹

¶ 12 It may be, as Defendants argue, that Plaintiffs could reasonably contain their horses without fencing in the easement portion of their land. However, this argument misses the point that Plaintiffs are the fee simple owners of the easement land, and as such, have the right to make reasonable use of that land so long as said use does not unreasonably interfere with Defendants’ easement rights. Accordingly, we hold that the trial court erred in determining that Plaintiffs’ erection of gates would not deprive Plaintiffs of the reasonable use of their tract.

2. Material Impairment or Unreasonable Interference

¶ 13 As to the second prong, the trial court determined that “[t]he gates erected by Plaintiffs are of a nature to materially impair and unreasonably interfere with the Defendants’ right of egress and ingress over the

1. *Ford v. Rice*, 195 Ky. 185, 241 S.W. 835 (1922) (finding two gates across an easement erected by servient estate to be reasonable and necessary to contain grazing animals); *Wille v. Bartz*, 88 Wis. 424, 60 N.W. 789 (1894) (allowing a servient estate owner’s gate that prevented the dominant estate owner’s livestock from encroaching); *Board of Trustees v. Gotten*, 119 Miss. 246, 80 So. 522 (1919) (ruling that that the trivial labor and trouble incident to the opening and closing of the gate did not in any way interfere with the full enjoyment of the easement); *Watson v. Hoke*, 73 S.C. 361, 364, 53 S.E. 537, 538 (1906) (“To require the defendant to throw his pasture lands open would deprive him of their use[.]”).

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road.” Plaintiffs argue that competent evidence does not support this determination. We disagree and conclude that the trial court’s findings as to this prong are supported by the evidence and, in turn, support this determination.

¶ 14 Our Supreme Court has instructed that when “the question of unreasonable obstruction is at issue[, it] should be determined by the jury.” *Chesson*, 224 N.C. at 293, 29 S.E.2d at 909.

¶ 15 Here, the trial court, as the fact-finder, found that there were many issues with the gates erected by Plaintiffs, some of which are as follows: The key boxes, where a code had to be entered to open the gate, were located well off the road, requiring Defendants to get out of their car to enter the code. Plaintiffs refused to provide Defendants a remote control. The keypads were temperamental in that a single mistype of the code sometimes locked Defendants out from trying again. The gates would sometimes not function in the cold weather. Plaintiffs’ horses sometimes congregated around the gates, making it difficult for Defendants to open the gates while keeping the horses from escaping.

¶ 16 These and the other findings of the trial court, sitting as the fact-finder, support the trial court’s determination that the gates, as constructed by Plaintiffs, constituted an unreasonable obstruction. As such, the trial court did not err in ordering Plaintiffs to remove the gates.

B. Plaintiffs’ Right to Erect Gates

¶ 17 In addition to ordering Plaintiffs to remove the existing gates, the trial court declared, “Plaintiffs are prohibited from installing gates across the road used by the Defendants to access their property as shown in [the 2000 map].” In other words, the trial court declared that Plaintiffs have no right to erect gates *at all* on the section of the easement created in 2000, notwithstanding that nothing in the documents creating that section of the easement requires the easement to remain “open.” This portion of the trial court order is error. Plaintiffs may erect gates, provided that the gates do not unreasonably interfere with Defendants’ use of the easement.

¶ 18 The trial court did not err in determining that Plaintiffs’ current gates interfere with Defendants’ use of the easement. However, this determination does not prevent Plaintiffs from erecting different gates in the future, so long as those gates do not unreasonably interfere with Defendants’ use of the easement. In other terms, as there is no express requirement that the easement remain “open,” and as the erection of gates is consistent with Plaintiffs’ reasonable enjoyment of their fee

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simple interest in the easement, Plaintiffs have the right to erect gates across the easement. The only limitation is that the gates cannot be erected in a way that interferes with Defendants' easement rights.

III. Conclusion

¶ 19 The portion of the trial court's judgment directing Plaintiffs to remove the existing gates is affirmed. The trial court's finding that the current gates unreasonably interfere with Defendants' use of the easement is supported by the evidence.

¶ 20 The portion of the trial court's judgment declaring that Plaintiffs have no right *at all* to erect gates across the portion of the easement created in 2000 is modified to allow the erection of gates by Plaintiffs, *provided that* the gates would not unreasonably interfere with Defendants' easement rights.

AFFIRMED, AS MODIFIED.

Judges GRIFFIN and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 SEPTEMBER 2021)

CAROLINA CHIROCARE & REHAB, INC. v. NATIONWIDE PROP. & CAS. INS. CO. 2021-NCCOA-504 No. 20-511	Wake (19CVS5875)	Affirmed
HAHN v. HAHN 2021-NCCOA-505 No. 20-856	Macon (20CVD478)	Reversed
IN RE A.D.G.C. 2021-NCCOA-506 No. 21-172	New Hanover (20JA121) (20JA122)	Vacated in part, reversed in part, and remanded
IN RE J.H. 2021-NCCOA-507 No. 21-189	Robeson (19JA308)	AFFIRMED IN PART; VACATED IN PART; REMANDED.
IN RE T.T. 2021-NCCOA-508 No. 21-181	Scotland (17JA33-36) (17JA69)	Affirmed
SLOK, LLC v. COURTSIDE CONDO. OWNERS ASS'N, INC. 2021-NCCOA-509 No. 20-606	Mecklenburg (17CVS8935)	Reversed and remanded in part; vacated and remanded in part.
STATE v. CAPPS 2021-NCCOA-510 No. 19-748	Orange (18CRS50730)	No Error
STATE v. CRANFORD 2021-NCCOA-511 No. 20-781	Lincoln (17CRS53484-85)	Affirmed
STATE v. FLEMING 2021-NCCOA-512 No. 20-391	Mecklenburg (17CRS202720) (17CRS26201)	APPEAL DISMISSED.
STATE v. KWIAGAYE 2021-NCCOA-513 No. 20-383	Mecklenburg (18CRS206824-26)	Remanded.
STATE v. MAY 2021-NCCOA-514 No. 20-703	Haywood (18CRS53893) (19CRS226)	No Error

STATE v. McNEILL 2021-NCCOA-515 No. 20-557	Cumberland (16CRS58298)	No Error
STATE v. MYERS 2021-NCCOA-516 No. 20-720	Rutherford (18CRS51344)	Dismissed
STATE v. ROBERTS 2021-NCCOA-517 No. 20-686	Davidson (18CRS56920) (18CRS56922) (19CRS303)	Vacated and Remanded
STATE v. SANDERS 2021-NCCOA-518 No. 20-460	New Hanover (18CRS52035)	No Error
STATE v. SUGGS 2021-NCCOA-519 No. 20-596	Pitt (18CRS51811)	No Error
STATE v. WOOLARD 2021-NCCOA-520 No. 21-14	Beaufort (16CRS51737) (16CRS51742) (16CRS51744) (16CRS51747) (16CRS51750)	Affirmed; Remanded for Correction of Clerical Error

AYERS v. CURRITUCK CNTY. DEP'T OF SOC. SERVS.

[279 N.C. App. 514, 2021-NCCOA-521]

JUDITH M. AYERS, PETITIONER

v.

CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA20-464

Filed 5 October 2021

Public Officers and Employees—career employees—dismissal—just cause—agency analysis of resulting harm

Where a career state employee was dismissed from her employment with a county department of social services (DSS) for using a racial epithet, meaningful appellate review of the determination by DSS that just cause existed to terminate was precluded where the agency did not consider the required resulting harm factor, one of several necessary factors set forth in *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583 (2015). The order of the administrative law judge (ALJ) imposing alternative discipline—after acknowledging the agency's failure to fully exercise its discretionary review—was remanded with instructions for the ALJ to remand to DSS to conduct a complete investigation.

Judge GORE concurring with separate opinion.

Appeal by Respondent from final decision entered 5 May 2020 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 23 March 2021.

Hornthal, Riley, Ellis, & Maland, L.L.P., by John D. Leidy, for petitioner-appellee.

The Twiford Law Firm, P.C., by John S. Morrison, for respondent-appellant.

MURPHY, Judge.

¶ 1

When a party challenges findings of fact and conclusions of law in an administrative law judge's ("ALJ") order reviewing discipline of a career State employee, we conduct a whole record test to determine whether substantial evidence supported the findings of fact and review the challenged conclusions of law de novo. When determining whether an agency had just cause for the disciplinary action taken against a

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career State employee, we must evaluate: (1) whether the employee engaged in the conduct the employer alleges; (2) whether the employee's conduct qualifies as unacceptable personal conduct under the North Carolina Administrative Code; and (3) whether that employee's misconduct amounted to just cause for the disciplinary action taken. *See Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 382-83, 726 S.E.2d 920, 925, *disc. rev. denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

¶ 2 However, when the Record shows an agency failed to consider a necessary factor in determining appropriate disciplinary action to take against a career State employee, resulting in the agency's failure to fully exercise its discretionary review under *Wetherington v. N.C. Dep't of Pub. Safety*, the ALJ must remand to the agency for an investigation that considers each required factor. Without the agency's full consideration of all factors, we cannot conduct an adequate de novo review on appeal. *See Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015) ("*Wetherington I*"). Here, the agency failed to consider a required factor under *Wetherington I*—resulting harm from the career State employee's unacceptable personal conduct—in its decision to terminate the career State employee, and the administrative law judge failed to remand this matter to the agency for a complete investigation and consideration of the required factor.

BACKGROUND

¶ 3 Respondent-Appellant Currituck County Department of Social Services ("DSS" or "the agency") brings its second appeal in this case. While facts from this case are set out in the original appeal, *Ayers v. Currituck Cty. Dep't of Soc. Servs.*, 267 N.C. App. 513, 514-17, 833 S.E.2d 649, 651-53 (2019) ("*Ayers I*"), we include a recitation of "the facts and procedural history relevant to the issues currently before us." *Premier, Inc. v. Peterson*, 255 N.C. App. 347, 348, 804 S.E.2d 599, 601 (2017).

A. Prior to Incident

¶ 4 Petitioner-Appellee Judith Ayers had been employed with DSS from 2007 until the incident in 2017. Ayers was the supervisor for the Child Protective Services Unit at DSS who reported directly to the DSS Director. Neither party contests that Ayers was a career State employee.¹

1. "Career State employee" is a term of art defined in N.C.G.S. § 126-1.1 as follows: "[C]areer State employee" means a State employee or an employee of a local entity who is covered by this Chapter pursuant to [N.C.G.S. §] 126-5(a)(2) who: (1) Is in a permanent position with a permanent appointment, and (2) Has been continuously employed by the

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¶ 5 Ayers consistently received positive work performance reviews and had never been disciplined as a DSS employee before the incident occurred. Until 30 June 2017, her boss was the DSS Director, Kathy Romm, who had hired Ayers; Romm had asked Ayers whether she wanted to take her position upon Romm's retirement. Ayers declined to pursue the position, and Romm hired another DSS employee, Samantha Hurd. Both Ayers and Hurd are Caucasian women.

¶ 6 Prior to Hurd's promotion, she supervised DSS's Foster Care Unit, and she and Ayers had a history of disagreements and conflict in their roles. The disagreements and conflict continued after Hurd's promotion.

B. Incident

¶ 7 On 3 November 2017, Hurd asked Ayers about a racial demarcation—"NR"—that a social worker had included on a client intake form; Hurd did not recognize the demarcation, asked Ayers what it stood for multiple times, and Ayers responded with a racial epithet. Ayers claimed she said "nigra rican," while Hurd claimed Ayers said "[n—] rican" ("the N word"). According to testimony from Hurd and Ayers, Ayers initially laughed about the comment, but became apologetic and embarrassed soon afterward. After investigation, Hurd and Ayers discovered the client referred to on the form was Caucasian.

C. Disciplinary Action

¶ 8 The incident occurred on Friday, 3 November 2017, and Hurd conferred with DSS's counsel over the following weekend. After receiving guidance, Hurd applied a twelve-factor test, derived from a guide for North Carolina public employers published by the University of North Carolina at Chapel Hill Institute of Government, to Ayers's comment and instituted disciplinary proceedings against her on Monday, 6 November 2017. The twelve-factor test² included the following considerations:

1. The nature and the seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was

State of North Carolina or a local entity as provided in [N.C.G.S. §] 126-5(a)(2) in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months." N.C.G.S. § 126-1.1(a) (2019). At the time of the incident and subsequent termination, Ayers was a career State employee.

2. Hurd obtained this twelve-factor test from the third edition of *Employment Law: A Guide for North Carolina Public Employers*, by Stephen Allred. See Stephen Allred, *Employment Law: A Guide for North Carolina Public Employers* (3d ed. 1999).

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intentional or technical or inadvertent, was committed maliciously or for gain, or was frequently repeated.

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

3. The employee's past disciplinary record.

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon [the] supervisor's confidence in the employee's ability to perform assigned duties.

6. The consistency of the penalty with those imposed[] upon other employees for the same or similar offenses.

7. The impact of the penalty upon the reputation of the agency[.]

8. The notoriety of the offense or its impact upon the reputation of the agency.

9. The clarity with which the employee was aware of any rules that were violated in committing the offense or had been warned about the conduct in question.

10. The potential for the employee's rehabilitation.

11. The presence of mitigating circumstances surrounding the offense such as unusual job tension; personality problems[;] mental impairment; harassment; or bad faith, malice or provocation on the part of others involved in the matter.

12. The adequacy and the effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

After meeting with Ayers, Hurd placed her on investigatory status with pay, and subsequently terminated her employment with DSS; Ayers appealed, and Hurd affirmed her decision. Ayers filed a *Petition for a Contested Case Hearing* with the Office of Administrative Hearings.

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D. 13 June 2018 ALJ Decision

¶ 10 An ALJ held a contested case hearing on 19 April 2018 and reversed Hurd's termination decision in a *Final Decision* filed 13 June 2018 ("First ALJ Order"). Findings of Fact 23 and 47 in the First ALJ Order described Ayers's and Hurd's different recollections of the word Ayers used, but the First ALJ Order also included the word "negra-rican," which was a third variation of the word. A fourth variation, "negro-rican," appeared in Conclusion of Law 13. The ALJ applied the three-prong test from *Warren*, determined the first prong of "whether the employee engaged in the conduct the employer alleges[.]" was not met in light of the disagreements on verbiage, and reversed Hurd's termination of Ayers. *See Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925. DSS appealed the First ALJ Order.

E. Ayers I

¶ 11 In an opinion filed 1 October 2019, we vacated and remanded the First ALJ Order. *Ayers I*, 267 N.C. App. at 513, 833 S.E.2d at 649. We noted Finding of Fact 23 from the First ALJ Order, which included a third and incorrect variation of the word used when describing the disagreement on epithet verbiage between Ayers and Hurd, was the "critical finding driving the ALJ's analysis" in its reversal of Hurd's termination decision. *Id.* at 523, 833 S.E.2d at 656. We found,

the ALJ's [f]inding is not supported by the evidence in the Record[, particularly Ayers's own testimony]. It is then apparent the ALJ carried out the remainder of its analysis under the misapprehension of the exact phrase used and that the ALJ's understanding of the exact phrase used was central to both the rest of the ALJ's [f]indings and its [c]onclusions of [l]aw. Therefore, we vacate the [First ALJ Order] in its entirety and remand this matter for the ALJ to reconsider its factual findings in light of the evidence of record and to make new conclusions based upon those factual findings.

Id. at 524, 833 S.E.2d at 656-57. In addition to noting "the ALJ's conclusions and considerations of the 'totality of the circumstances' were also grounded in its misapprehension of the evidentiary record[.]" we held either " 'n---- rican' or the variant 'nigra rican' " "constitute[d] a racial epithet[.]" and DSS "met its initial burden of proving [Ayers] engaged in the conduct alleged under *Warren*." *Id.* at 525-26, 833 S.E.2d at 657-58. In vacating the First ALJ Order, we instructed the ALJ to "make new

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findings of fact supported by the evidence in the record and continue its analysis under *Warren* of whether [Ayers] engaged in unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline.” *Id.* at 526-27, 833 S.E.2d at 658.³

F. ALJ Decision on Remand

¶ 12

On remand, the ALJ entered its *Final Decision on Remand* (“Second ALJ Order”) on 5 May 2020, made additional findings of fact and conclusions of law, applied the three-prong *Warren* test, and reversed DSS’s termination of Ayers. The ALJ decided the first two prongs of the *Warren* test—Ayers engaging in the conduct alleged and the conduct constituting unacceptable personal conduct—were met. Ayers, as the appellee, does not contest that decision. However, the ALJ concluded the third prong of the *Warren* test—whether DSS had just cause for the disciplinary action taken under N.C.G.S. § 126-35(a)—was not met. *See Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. In concluding a lesser disciplinary measure was warranted, the Second ALJ Order focused on: Ayers’s “ten-year employment history with no prior disciplinary actions” and high performance reviews; that Hurd “did not think it was significant whether anyone heard [Ayers’s] comment”; the lack of evidence that this one-time comment was harassment of a specific individual or caused actual harm to DSS, until DSS revealed the incident to others; and that DSS’s decision “was influenced by . . . past philosophical differences [between Hurd and Ayers] and their past history.” However, the Second ALJ Order also found that “[DSS] did not consider if [Ayers’s] . . . comment caused any actual harm to the agency’s reputation. [DSS] only considered potential harm to the agency.” The Second ALJ Order also acknowledged the lack of resolution regarding whether anyone other than Hurd heard Ayers’s epithet, which the ALJ deemed a “necessary consideration.” Despite the lack of resolution of the resulting harm factor from *Wetherington I*, the Second ALJ Order retroactively reinstated Ayers with a two-week suspension without pay, ordered back pay, and ordered reimbursement of Ayers’s attorney fees. *See Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548.

3. In our review of the First ALJ Order in *Ayers I*, we reversed “the ALJ’s conclusion that DSS ‘failed to prove the first prong of *Warren*[.]’ ” and further held, “on remand, the ALJ should make new findings of fact supported by the evidence in the record and continue its analysis under *Warren* of whether [Ayers] engaged in unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline.” *Ayers I*, 267 N.C. App. at 526-27, 833 S.E.2d at 658. As such, *Ayers I* did not reach the third prong of the *Warren* test—whether that employee’s misconduct amounted to just cause for the disciplinary action taken. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Here, the third prong of the *Warren* test is at issue for the first time.

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¶ 13 DSS appeals the Second ALJ Order and presents the following three arguments: (A) “the ALJ made findings of fact not supported by substantial evidence” in its Second ALJ Order; (B) specific conclusions of law from the Second ALJ Order are erroneous; and, (C) DSS “had just cause to dismiss [Ayers].” After analyzing the nature of ALJ and appellate court review of an agency’s disciplinary decision regarding a career State employee, including standards of review, we determine that our appellate review cannot meaningfully be conducted in light of DSS’s investigation and the Second ALJ Order.

ANALYSIS**A. ALJ Review of Career State Employee Discipline**

¶ 14 A career State employee may be disciplined for two reasons: unsatisfactory job performance (“UJP”) or unacceptable personal conduct (“UPC”). *See* 25 N.C.A.C. 1J.0604(b) (2019). Under the North Carolina Administrative Code, just cause for the written warning, dismissal, suspension, or demotion of a career State employee may be established only on a showing of UPC or UJP, “including grossly inefficient job performance.” 25 N.C.A.C. 1J.0604(a)-(b) (2019). Here, UJP is not the proffered reason for DSS’s discipline of Ayers; instead, UPC is at issue.

¶ 15 UPC includes, *inter alia*, the following examples, which DSS accused Hurd of committing:

(a) conduct for which no reasonable person should expect to receive prior warning;

...

(d) the willful violation of known or written work rules;

(e) conduct unbecoming a [S]tate employee that is detrimental to [S]tate service

25 N.C.A.C. 1J.0614(8)(a), (d), (e) (2019); *see Ayers I*, 267 N.C. App. at 521-22, 833 S.E.2d at 655. Where a career State employee has committed UJP or UPC, “[t]he North Carolina Administrative Code sets forth four disciplinary alternatives, which may be imposed against an employee upon a finding of just cause: ‘(1) [W]ritten warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal.’” *Harris v. N.C. Dep’t of Pub. Safety*, 252 N.C. App. 94, 108, 798 S.E.2d 127, 137 (quoting 25 N.C.A.C. 1J.0604(a) (2017)), *aff’d per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017).

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¶ 16 An ALJ has authority to impose discipline that is different from what the agency originally decided, as long as that discipline is approved under the North Carolina Administrative Code and just cause did not exist for the discipline imposed by the agency.

An ALJ, reviewing an agency's decision to discipline a career State employee within the context of a contested case hearing, owes no deference to the agency's conclusion of law that . . . just cause existed . . . [for] the agency's action. . . . [W]hether just cause exists is a conclusion of law, which the ALJ had authority to review *de novo*.

. . . .

Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and balances the equities, the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions.

Harris, 252 N.C. App. at 102, 109, 798 S.E.2d at 134, 138 (marks and citations omitted).

¶ 17 In conducting its *de novo* review of the agency's disciplinary investigation and determination, an ALJ reviews, *inter alia*, whether the agency, in the agency's discretionary review of whether to discipline a career State employee, considered the following required factors:

[T]he severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations. . . . [C]onsideration of these factors is an appropriate *and necessary component* of a decision to impose discipline upon a career State employee for [UPC].

Wetherington I, 368 N.C. at 592, 780 S.E.2d at 548 (emphasis added).

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B. Appellate Court Just Cause Review

¶ 18 “It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency’s decision are reviewed under the whole-record test.” *N.C. Dep’t of Env’t & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (marks omitted). “An appellate court’s standard of review of an agency’s final decision—and now, an administrative law judge’s final decision—has been, and remains, whole record on the findings of fact and *de novo* on the conclusions of law.” *Harris*, 252 N.C. App. at 102, 798 S.E.2d at 134.

¶ 19 Accordingly, “[d]etermining whether a public employer had just cause to discipline its employee *requires two separate inquiries*: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken.” *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (emphasis added) (marks omitted). “The first half of the inquiry, *Carroll* instructs us, is a question of fact to be examined under the whole record test. The second half, by contrast, is a question of law to be examined *de novo*.” *Early v. Cty. of Durham Dep’t of Soc. Servs.*, 172 N.C. App. 344, 360, 616 S.E.2d 553, 564 (2005) (citing *Carroll*, 358 N.C. at 665-66, 599 S.E.2d at 898), *disc. rev. improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006).

¶ 20 While the application of the whole record test to questions of fact is important,

the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was just. Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations. Just cause is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case.

Wetherington I, 368 N.C. at 591, 780 S.E.2d at 547 (marks and citation omitted); see N.C.G.S. § 126-35(a) (2019) (“No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.”). “Whether conduct constitutes just cause for the disciplinary action taken is a question of law we review *de novo*.” *Warren*, 221 N.C. App. at 378, 726 S.E.2d at 923.

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¶ 21

Warren summarized this precedent as follows:

Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case. Thus, not *every* violation of law gives rise to just cause for employee discipline.

....

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct.[] The proper analytical approach is to *first determine* whether the employee *engaged in the conduct* the employer alleges. The *second inquiry* is whether the employee's conduct falls within one of the categories of *unacceptable personal conduct* provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the *third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken*. Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

Id. at 381, 382-83, 726 S.E.2d at 924, 925 (emphases added) (marks and footnote omitted).

C. Meaningful Appellate Review

¶ 22

Here, the first two prongs under *Warren*—whether Ayers engaged in the conduct the agency alleges and whether that conduct falls within disciplinable UPC—were met. Whether just cause existed for DSS to terminate Ayers's employment is the subject of this appeal, which we review de novo. *Id.* at 378, 726 S.E.2d at 923.

¶ 23

However, the ALJ found DSS did not consider one of the required factors under *Wetherington I*—the resulting harm from Ayers's UPC.

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See *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. In challenging the Second ALJ Order, DSS does not address the *Wetherington I* factors, but instead emphasizes that Hurd appropriately used her discretion in making the disciplinary decision after thoroughly conducting the twelve-factor analysis from Stephen Allred's UNC School of Government publication *Employment Law: A Guide for North Carolina Public Employers*. See Stephen Allred, *Employment Law: A Guide for North Carolina Public Employers* (3d ed. 1999). The factors Hurd considered are listed in Finding of Fact 69, and do not include "resulting harm." See *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548 (requiring consideration of the "resulting harm" from the career State employee's violation). DSS relies on our interpretation of *Wetherington I* in *Wetherington v. N.C. Dep't of Pub. Safety*, 270 N.C. App. 161, 840 S.E.2d 812 (*"Wetherington II"*), *disc. rev. denied*, 374 N.C. 746, 842 S.E.2d 585 (2020), to emphasize Hurd's discretion in making the decision to discipline Ayers. In *Wetherington II*, we stated: "Although the primary holding in [*Wetherington I*] was that public agency decision-makers must use discretion in determining what disciplinary action to impose in situations involving alleged unacceptable personal conduct, the Court did identify factors that are appropriate and necessary components of that discretionary exercise." *Wetherington II*, 270 N.C. App. at 190, 840 S.E.2d at 832 (quoting *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 25, 802 S.E.2d 115, 131 (2017), *disc. rev. denied*, 371 N.C. 343, 813 S.E.2d 857 (2018)). DSS emphasizes our inclusion of "must use discretion" and "discretionary exercise" in the above quote and claims Hurd properly exercised her discretion through consideration of the factors, "all facts and circumstances, [and] different available punishments[.]"

¶ 24

However, *Wetherington I*, and our reasoning in *Wetherington II*, exemplify that DSS did not properly exercise its discretion in its disciplinary investigation of Ayers. In *Wetherington II*, we characterized the *Wetherington I* factors—severity of the violation, subject matter involved, resulting harm, work history, and discipline imposed in other similar cases—as "appropriate and necessary components" for consideration when an agency makes a disciplinary decision regarding a career State employee. *Id.* Additionally, we emphasized the "[r]espondent was directed to consider *all of these factors*, at least to the extent there was any evidence to support them. [The] [r]espondent could not rely on one factor while ignoring the others." *Id.* (emphasis added); see also *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. Similar to the respondent in *Wetherington II*, DSS was required to consider all of the factors from *Wetherington I*. However, the ALJ found that Hurd, as DSS's representative in the disciplinary decision regarding Ayers, did not consider

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the necessary resulting harm factor, and thus did not consider all of the required factors.⁴

¶ 25 The ALJ's Findings of Fact 71 and 74—that DSS did not consider the required factor of resulting harm—are also supported by substantial evidence in the Record.⁵ See *Harris*, 252 N.C. App. at 107, 798 S.E.2d at 137 (marks omitted) (“We afford a high degree of deference to the ALJ’s findings, when they are supported by substantial evidence in the record.”). DSS did not consider whether there was any harm to DSS in its consideration of discipline for Ayers, despite the detailed nature of Hurd’s investigation. Instead, Hurd’s testimony revealed she considered the *potential* for harm to the reputation of, and workers at, DSS and acknowledged the lack of evidence that anyone other than her heard Ayers’s epithet. On cross-examination, Hurd testified:

[AYERS’S COUNSEL:] You’re talking about [considering] the potential for harm, right?

[HURD:] Yes, sir.

[AYERS’S COUNSEL:] But I’m asking whether you considered whether there was any actual harm resulting from her statement?

[HURD:] Well, I don’t know. I guess it depends on how it could be defined. She called the – she referred to the children in the F family as [the N word] rican, and I heard it. I thought that was extremely offensive and inflammatory.

[AYERS’S COUNSEL:] But you have no evidence that they were harmed in any way by her statement, right?

[HURD:] Well, not that I know of.

Substantial evidence supports the ALJ’s determination that Hurd, and DSS, did not consider a required factor under *Wetherington I*.

¶ 26 In *Wetherington I*, when our Supreme Court determined the employing agency did not conduct its discretionary disciplinary review appropriately, it remanded to the employing agency for a disciplinary review that employed, *inter alia*, the consideration of the factors required.

4. Hurd admitted to her lack of investigation and consideration of the resulting harm to DSS from Ayers’s UPC in the disciplinary decision.

5. On appeal, DSS challenges Findings of Fact 33, 39, 50, 55, 60, 67, 71, 74, 76, 77, and 82 as not supported by substantial evidence.

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Wetherington I, 368 N.C. at 593, 780 S.E.2d at 548. Under *Wetherington I*, the ALJ and subsequently reviewing courts are tasked with conducting de novo review of DSS's disciplinary decision, relying on corresponding findings of fact from the ALJ regarding whether just cause existed to terminate Ayers; DSS's disciplinary investigation must be complete for proper, subsequent review of that decision to occur.

¶ 27 As a result of DSS's incomplete investigation, a remand was necessary for a completion of that investigation, and we cannot conduct meaningful de novo appellate review regarding whether just cause existed to terminate Ayers. See *Mills v. N.C. Dep't of Health & Human Servs.*, 251 N.C. App. 182, 193-95, 794 S.E.2d 566, 573-74 (2016) (noting "inadequacies in the ALJ's analysis frustrate meaningful [appellate] review"). DSS's failure to consider the resulting harm to the agency from Ayers's UPC was a failure to fully exercise its discretionary review under *Wetherington I*. The incomplete nature of DSS's investigation, as well as the ALJ's de novo review of DSS's disciplinary decision, is demonstrated by Conclusion of Law 24 from the Second ALJ Order, which stated "Hurd admitted that she did not think it was significant whether anyone heard [Ayers's] comment on [3 November 2017]. However, *whether* anyone else heard such statement was a *necessary consideration* in weighing the evidence *to determine* the severity of the conduct and *whether just cause existed* to terminate [Ayers]." (Emphases added). DSS did not make such a necessary consideration in its disciplinary investigation, rendering the investigation incomplete and the ALJ's findings regarding whether such harm occurred too speculative. For us to conduct meaningful appellate review regarding just cause for disciplinary action, the ALJ must make complete findings of fact regarding the harm to DSS resulting from Ayers's UPC, including whether any occurred. See *Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548. The ALJ can only make such findings if DSS conducts a complete investigation under *Wetherington I*.

¶ 28 Similar to our Supreme Court's mandate in *Wetherington I*, we must remand to the ALJ with instructions to remand to DSS to conduct a complete, discretionary review regarding Ayers's UPC and corresponding disciplinary action.

CONCLUSION

¶ 29 From a review of the Record and Transcript, DSS did not consider the necessary factor of resulting harm in her determination regarding whether and how to discipline Ayers. The ALJ's determination in the Second ALJ Order that DSS's investigation into Ayers's conduct was incomplete comports with *Wetherington I* and *II*. Under *Wetherington I*,

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the appropriate remedy was to remand this matter to DSS with instructions to conduct a complete disciplinary investigation regarding Ayers's UPC. We remand to the ALJ with instructions to remand this matter to DSS for additional proceedings not inconsistent with this opinion.

REMANDED.

Judge DIETZ concurs.

Judge GORE concurs with separate opinion.

GORE, Judge, concurring.

¶ 30 I concur with the majority in its legal reasoning. However, I must draw attention to the concern I have for our current law to require a resulting harm in an employee and agency dispute that is charged with the unwavering responsibility of protecting children in North Carolina. Social workers employed by County Department of Social Services ("DSS") are on the front line of the battle against harm that might come to our children. The facts of this case are concerning.

¶ 31 I am troubled that our law requires a resulting harm that involves employees charged with protecting children. I know this standard is balanced against the rights afforded to state employees. However, I analyze that standard against the fact that the same state employees are responsible for substantiating facts related to the actual harm or risk of harm to children within areas of DSS care. It is arguable that a proven resulting harm to the agency might not directly affect a child in DSS care. In contrast, it can be put forth that anything negatively affecting DSS ultimately hurts a child in its care. It is this Court's responsibility to thoroughly analyze the law as it is and its results.

¶ 32 I want to make sure that it is discussed that conduct by state employees have varying degrees of resulting harm. A DSS employee's conduct that creates a resulting harm or even conduct that presents a risk of harm should not be taken lightly. Our child protective system works to prevent harm upon one of our most precious resources, our children, and the law should be equally vigilant. I hereafter concur.

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LOUIS M. BOUVIER, JR., KAREN ANDREA NIEHANS, SAMUEL R. NIEHANS, AND
JOSEPH D. GOLDEN, PLAINTIFFS

v.

WILLIAM CLARK PORTER, IV, HOLTZMAN VOGEL JOSEFIK TORCHINSKY PLLC,
STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, AND THE PAT
MCCRORY COMMITTEE LEGAL DEFENSE FUND, DEFENDANTS

No. COA20-441

Filed 5 October 2021

1. Appeal and Error—interlocutory order—substantial right—defense of absolute privilege

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, the trial court's interlocutory order granting summary judgment to plaintiffs on defendants' affirmative defenses—including absolute privilege regarding the allegedly defamatory statements that were made in a quasi-judicial proceeding—was immediately appealable because the denial of immunity under the absolute privilege claim affected a substantial right.

2. Elections—protest—defense of absolute privilege—applicability—quasi-judicial proceeding

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, absolute privilege was available to defendants as an affirmative defense because statements made in an election protest to a county board of elections—which has statutory authority to conduct investigations into and make discretionary decisions about how elections are conducted—are statements made in the course of a quasi-judicial proceeding.

3. Elections—protest—defense of absolute privilege—challenge to individual voters—relevance to protest

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, although plaintiffs argued that absolute privilege was not available to defendants as an affirmative defense on the basis that defendants' allegedly defamatory statements regarding individual voters should have been classified as an untimely voter challenge rather than an election protest (each governed by different statutory provisions), the statements were sufficiently relevant to the subject matter of the controversy put before the elections boards to qualify for the privilege.

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4. Immunity—libel suit involving election protest—absolute privilege—applicable only to direct participant in suit

In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, the defense of absolute privilege applied to the individual who filed the election protest, but not to a candidate's legal defense fund or the law firm defendants hired by that fund to prepare the election protest. Since the privilege extends only to statements made in the due course of a judicial proceeding, where neither the defense fund nor the law firm defendants directly participated in the election protest proceedings or acted on behalf of the individual protestor, they were not entitled to the protection of absolute immunity.

Appeal by Defendants from Order entered 21 December 2019, by Judge R. Allen Baddour, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2021.

Southern Coalition for Social Justice, by Jeffrey Loperfido and Allison J. Riggs, and Womble Bond Dickinson (US) LLP, by Pressly M. Millen and Ripley Rand, for plaintiffs-appellees Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Gary S. Parsons and Craig D. Schauer, for defendants-appellants Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, and Steven Saxe.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Isley, and Higgins Benjamin, PLLC, by Robert N. Hunter, Jr., for defendant-appellant Pat McCrory Committee Legal Defense Fund.

Jewel A. Farlow for defendant-appellant William Clark Porter, IV.

Fox Rothschild LLP, by Matthew Nis Leerberg and Zachary Thomas Dawson, for amici curiae Sharad Goel, Marc Meredith, David Rothschild, and Houshmand Shirani-Mehr.

HAMPSON, Judge.

¶ 1

This appeal arises from a libel suit filed by Louis Bouvier, Jr. (Bouvier), Karen and Samuel Niehans (the Niehans), and Joseph Golden

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(Golden) (collectively, Plaintiffs). Plaintiffs' libel suit is premised on allegations that, following the 2016 General Election, defamatory statements, including in election protests filed with their respective County Boards of Elections following the General Election, were made against Plaintiffs falsely accusing Plaintiffs of double-voting. As presently constituted, Plaintiffs' libel suit names: William Clark Porter, IV (Porter), under whose signature one of the election protests was filed; the Pat McCrory Legal Defense Fund (the Defense Fund); and Holtzman Vogel Josefiak Torchinsky PLLC (HVJT) along with HVJT attorneys Steve Roberts, Erin Clark, Gabriela Fallon, and Steven Saxe (HVJT and the HVJT attorneys are collectively referred to as the Law Firm Defendants), who were hired by the Defense Fund and were responsible for preparing the election protests at issue.

¶ 2 Porter, the Defense Fund, and the Law Firm Defendants (collectively, Defendants) now appeal from a partial Summary Judgment Order entered in favor of Plaintiffs. The trial court's Summary Judgment Order denied Defendants' Motion for Summary Judgment and granted Plaintiffs' Motion for Summary Judgment as to Defendants' affirmative defenses, and, thus, dismissed Defendants' claimed affirmative defenses of: absolute privilege; qualified privilege; fair report privilege; fair comment privilege; free speech defense; right to petition; immunity based on the Findings of the Guilford County Board of Elections; statutory right to make a protest; and failure to mitigate damages.

¶ 3 In this appeal, Defendants raise a single issue: whether the trial court erred in concluding none of the Defendants was entitled to the protection of absolute privilege from this defamation suit arising from allegations made in the election protests before County Boards of Elections. Thus, we review only this limited issue and make no determination on the merits of Plaintiffs' underlying libel claim or the availability of any other defenses to Defendants. Ultimately, we conclude that while Porter—who was a party to a quasi-judicial election protest proceeding—is entitled to absolute privilege, the remaining Defendants—who did not make their allegedly defamatory statements while participating in election protest proceedings in any capacity (e.g., as parties, witnesses, or attorneys), and thus, did not make allegedly defamatory statements in the course of a quasi-judicial proceeding—are not entitled to the defense of absolute privilege. As a result, we affirm the trial court's Summary Judgment Order in part, reverse it in part, and remand this matter to the trial court to enter Summary Judgment for Defendant Porter and to conduct further proceedings in the case. The Record before us tends to reflect the following:

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Factual and Procedural Background

¶ 4 Plaintiffs, registered voters and North Carolina residents, each cast ballots in the 2016 General Election during early voting and did so in their county of residence—Bouvier and the Niehans in Guilford County; and Golden in Brunswick County. The 2016 General Election included a tightly contested gubernatorial race between then-incumbent Governor Pat McCrory and then-challenger Roy Cooper. Vote tallies the morning after the election reflected McCrory trailed Cooper by approximately 5,000 votes.

¶ 5 On 10 November 2016, in the wake of this close election, the McCrory campaign formed the Defense Fund “in preparation for an ongoing legal battle and associated expenses relating to the extended gubernatorial contest.” The Defense Fund engaged Jason Torchinsky (Torchinsky) of HVJT to serve as the Defense Fund’s counsel. HVJT is a law firm with offices in Virginia and Washington, D.C. A press release announcing the formation of the Defense Fund dated 10 November 2016 identified Torchinsky as “chief legal counsel” for the Defense Fund. Four HVJT lawyers—Defendants Steve Roberts, Erin Clark, Gabriela Fallon, and Steven Saxe—joined Torchinsky in North Carolina to work on the Defense Fund’s post-election efforts. On this Record, it does not appear that any of these four lawyers were licensed or authorized to practice law in North Carolina. As a general proposition, the Law Firm Defendants claim the work they were doing in North Carolina on behalf of the Defense Fund did not constitute legal work or the practice of law. In particular, Attorney Roberts testified in deposition that this was so “[b]ecause [they] were not entering appearances before any judicial bodies.”

¶ 6 The Law Firm Defendants, working with Republican National Committee data analysts, compiled a list of names of potential double voters and prepared election protest forms to be filed with County Boards of Elections challenging purportedly ineligible voters. The Defense Fund authorized the Law Firm Defendants to file election protests challenging these allegedly ineligible voters. However, the Defense Fund decided local residents—rather than then-Governor McCrory himself—should file the protests. On 17 November 2016, the McCrory campaign announced protests were being filed in 50 counties “to challenge known instances of votes being cast by dead people, felons or individuals who voted more than once[,]” seeking “to void anywhere between 100 to 200 ballots” These included the election protests at issue in this case alleging Plaintiffs each voted more than once in the 2016 General Election.

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¶ 7 Attorney Roberts was charged with preparing the election protest forms to be filed in Guilford County, which included allegations against Bouvier and the Niehans. One such protest identified Bouvier and the Niehans as “persons known to have voted in multiple states” (Guilford County Protest). When asked what specific data he relied on that indicated these three Plaintiffs had voted in another state, Attorney Roberts testified:

The specific data was that they appeared on a list produced by a data analyst who had run whatever processes on the data that were enough to satisfy [the analyst] and Jason Torchinsky, that there was enough . . . for him to reasonably believe those individuals . . . had voted in more than one jurisdiction in the same election.

When asked if he knew upon what data the analyst relied, Attorney Roberts testified: “I would have no reason to understand a dataset that I was looking at, so no.”

¶ 8 Meanwhile, the Defense Fund identified Porter as a potential volunteer to file the Guilford County Protest. During a phone call from Attorney Roberts to Porter, Porter asked Attorney Roberts whether the protest was “frivolous, because [he] didn’t want to attach [his] name to anything regardless of what it was if it was just frivolous[,]” to which Attorney Roberts replied, “no, it had meat.” Following the conversation, Porter permitted Attorney Roberts via e-mail to sign the Guilford County Protest on his behalf. Attorney Roberts testified in preparing and filing the Guilford County Protest he did not engage in the practice of law or legal work on behalf of the Defense Fund. He also testified in filing the Protest he was not acting either as Porter’s attorney or as Porter’s “attorney in fact.”

¶ 9 As far as Porter’s knowledge of the allegations in the Guilford County Protest, when asked during his deposition whether he had heard of the individuals accused of double voting in the Protest, Porter replied:

A. To the best of my knowledge, no.

. . . .

Q. What was the basis of accusing Karen Andrea Niehans of casting an invalid ballot and having voted in another state?

A. What’s the basis? Attorney Steve Roberts.

Q. What Roberts told you?

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A. Yes.

Q. Did Roberts tell you anything specifically about her?

A. Not that I recall. He may not even -- he may not have mentioned her name specifically.

Q. Okay. Do you personally have any basis for stating that she was, quote, known to have voted in multiple states?

A. Other than maybe what Attorney Roberts stated.

Q. Well, I understand you might have been told something by somebody else, but my question is do you have personal knowledge --

A. -- I do not have any in-hand [sic] knowledge.

Q. Did you witness any misconduct on the part of Ms. Niehans?

A. To the best of my knowledge, no.

Q. Okay. The same questions regarding Samuel R. Niehans. What was the basis of accusing Samuel R. Niehans of casting an invalid ballot and having voted in another state?

A. Here, again, I -- to the best of my knowledge, I'm not even sure if their names were mentioned.

....

Q. All right. Do you have any personal knowledge that he was known to have voted in a state other than North Carolina?

A. Not directly, no, other than what Attorney Roberts told me.

....

Q. Okay. Did you witness any misconduct on the part of Mr. Niehans?

A. Obviously to the best of my knowledge, no.

Q. Okay. What was the basis of accusing Louis Maurice Bouvier, Jr. of casting a[n] invalid ballot and having voted in another state?

A. The same answer would apply from what you just asked, and with Attorney Steve Roberts.

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Q. Do you have any recollection of a discussion specifically about Mr. Bouvier?

A. No.

Q. Do you have any personal basis for stating that he was known to have voted in more than one state?

A. I don't have any personal [sic] other than what Attorney Steve Roberts told me.

Q. Did you witness any misconduct on the part of Mr. Bouvier?

A. To the best of my knowledge, no.

¶ 10 The Guilford County Protest, filed on 17 November 2016, contained the following language:

5. Does this protest involve an alleged error in vote count or tabulation? If so, please explain in detail.

Upon review of early voting files from other states, it appears that nine (9) individuals cast ballots in both North Carolina and another state. Casting a ballot in more than one state is a clear violation of North Carolina and federal election laws. Therefore, these ballots were erroneously counted and tabulated by the GUILFORD County Board of Elections.

....

8. Please provide the names, addresses, and phone numbers of any witnesses to any misconduct alleged by you in this protest, and specify what each witness listed saw or knows.

William Porter

....

Based on a review of the public records described in section 5 above, I allege as described herein.

....

10. Do you contend the allegations set out by you are sufficient to have affected or cast doubt upon the results of the protested election? If you answer is yes, please state the factual basis for your opinion.

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Yes. The described allegations clearly demonstrate that ballots cast by persons who voted in multiple states, for the election held on November 8, 2016 in GUILFORD County, are invalid under State law. The invalid ballots cast by persons who have voted in multiple states in violation of state and federal law, must not be counted for any office voted.

¶ 11 The first time Porter saw the Guilford County Protest itself was at his deposition. Prior to a 21 November 2016 hearing before the Guilford County Board of Elections, Porter tried contacting Attorney Roberts, but Attorney Roberts did not answer. While Porter expected Attorney Roberts or a colleague to appear at the hearing, nobody appeared to represent him. The Guilford County Board of Elections dismissed the protest against Bouvier and the Niehans for “lack of any evidence presented[.]”

¶ 12 Separately, Attorney Clark drafted an election protest form, to be filed in Brunswick County (Brunswick County Protest), which alleged Golden, among others, had voted twice. Thereafter, Joseph Agovino (Agovino) received a call “from somebody from the state committee or somebody from McCrory’s campaign . . . who indicated that they had identified a case of voter fraud of somebody who ha[d] lived in this area who came from another jurisdiction and voted twice.” The caller asked Agovino “if [he] would be willing to, you know, make a complaint against an individual[.]” Agovino recalled during his deposition:

They gave me the name of [Golden]. They told me where he lived and told me how to file or, you know, number one, they asked me would I be interested in filing or please file, you know. It was one of those things they said it was part of my – you know, I should be doing this as the chairperson. I remember asking, “You definitely have evidence of this?” And they said yes. And I said - you know, I wanted to make sure they had evidence of this, and they said yes.

Agovino advised the caller: “ ‘As long as you can prove it, I would be more than willing to’ – you know, not more than willing but I would be willing to do it.” Attorney Clark provided a completed election protest form to Agovino, who signed it. The Protest was then filed with the Brunswick County Board of Elections. Attorney Clark later testified Agovino was not her client.

¶ 13 When asked during his deposition whether he reviewed any files with respect to Golden’s alleged voting, Agovino replied:

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A. Personally? No.

Q. Did you review any voter files from this state before the protest was filed?

A. No, I did not.

Q. Okay. But on November 17th when the protest was filed, did you believe that Mr. Golden had voted in two states?

A. Yes, I did.

Q. And why is that?

A. Because of the conversations and so-called evidence that I was supposed to have received that he had voted in two places.

Q. And you did ask to review the voting files before the protest was filed?

A. I asked for evidence. I did not ask to review specific voting files, no. I assumed that's what she was going to get me and so that never came.

The Brunswick County Protest contained the following:

5. Does this protest involve an alleged error in vote count or tabulation? If so, please explain in detail.

Upon review of early voting files from other states, it appears that one (1) individual cast ballots in both North Carolina and another state. Casting a ballot in more than one state is a clear violation of North Carolina and federal election laws. Therefore, these ballots were erroneously counted and tabulated by the BRUNSWICK County Board of Elections.

....

8. Please provide the names, addresses, and phone numbers of any witnesses to any misconduct alleged by you in this protest, and specify what each witness listed saw or knows.

Joe Agovino, . . . early voting files from other states[.]

....

10. Do you contend the allegations set out by you are sufficient to have affected or cast doubt upon the

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results of the protested election? If your answer is yes, please state the factual basis for your opinion.

Yes. The described allegations clearly demonstrate that ballots cast by persons who voted in multiple states, for the election held on November 8, 2016 in BRUNSWICK County, are invalid under State law. The invalid ballots cast by persons who have voted in multiple states in violation of state and federal law, must not be counted for any office voted.

¶ 14 Regarding the filing of the Brunswick County Protest, Clark was asked the following:

Q. Section eight of this protest says please provide the names, addresses and phone numbers of any witnesses to any misconduct alleged by you in this protest. Do you see that?

A. Yes.

Q. You listed Mr. Agovino's name here, is that correct?

A. Yes.

Q. That was false because Mr. Agovino in fact wasn't a witness to any misconduct was he?

A. I guess not.

Q. So it was false?

A. Yes.

....

Q. Was the fact of Mr. Golden's alleged multiple voting known to Mr. Agovino – the person who signed the protest?

A. Yes.

Q. How was it known to him?

A. I guess it wasn't known. This was the wording drafted by whoever wrote the election protest

Q. When you filled this out you said that it was known that Mr. Golden had voted in multiple states, right?

A. Yes.

....

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Q. It wasn't known by Mr. Agovino, the person who signed the protest, right?

A. Yes.

¶ 15 After filing the Brunswick County Protest, Agovino kept in touch with the director of the Board of Elections, who, in turn, "checked with the county in which [Golden] was supposed to have resided in the other state" The director then got back to Agovino informing him "there was no evidence that [Golden] voted in that county, absentee or otherwise." Agovino then "called the state party." "They put me in touch with the campaign because that's who was running it and stuff. The attorney said that she was going to get back to me." A week later, Agovino learned "all the attorneys essentially went back to where they came from" and the attorney with whom he had been in contact "was from out of state[.]" "[S]omeone else said that, you know, they'll get back to me. They never got back to me." On 22 November 2016, Agovino withdrew the protest. "I was a little upset then[.]" he recalled. "They left me hanging down there[.]"

¶ 16 On 8 February 2017, Plaintiffs filed an action for libel against Porter, and on 9 November 2017 filed an Amended Complaint adding the Law Firm Defendants and the Defense Fund.¹ In the Amended Complaint, Plaintiffs also added a claim for civil conspiracy against all Defendants and requested a class action certification. The same day, the case was designated as exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. On 6 June 2018, the trial court granted Defendants' Motion to Dismiss Plaintiffs' proposed class certification and denied it as to Plaintiffs' remaining claims alleged in the Amended Complaint.

¶ 17 On 3 September 2019, Defendants jointly moved for Summary Judgment on all claims asserted by Plaintiffs. On the same day, Plaintiffs moved for Summary Judgment on all Defendants' affirmative defenses, including, among others, the defense of absolute privilege. After a 20 November 2019 hearing, the trial court entered its Order denying Defendants' Motion, granting Plaintiffs' Motion, and dismissing Defendants' affirmative defenses. On 17 January 2020, Defendants timely filed a written Notice of Appeal.

1. The original Complaint included Gabriel Arthur Thabet as a Plaintiff. Thabet filed a Notice of Voluntary Dismissal on 10 July 2017 and was not a party to the Amended Complaint.

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Appellate Jurisdiction

¶ 18 [1] As Defendants acknowledge, the trial court's Order denying Defendants' Motion for Summary Judgment and granting Plaintiffs partial Summary Judgment is interlocutory in nature in that it leaves pending Plaintiffs' claims against Defendants. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). Defendants, however, argue this Court has appellate jurisdiction over this appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) because the trial court's Order rejecting their invocation of the absolute privilege defense affects a substantial right which would be lost absent an immediate appeal.

¶ 19 Indeed, in *Topping v. Myers*, this Court analogized the absolute privilege defense to a defense of sovereign or public official immunity and recognized: "[i]f an absolute bar to suit extends and applies to [d]efendants' actions, the trial court's failure to dismiss [p]laintiff's claims deprives [d]efendants of immunity from suit[.]" 270 N.C. App. 613, 617, 842 S.E.2d 95, 99 (2020), *appeal dismissed, review denied*, 854 S.E.2d 800 (N.C. 2021). "If applicable, this denial of immunity from suit, as asserted in Defendants' motion, is a substantial right for Defendants, which would be lost, absent interlocutory review." *Id.* (citation omitted). In *Topping*, we conducted a full analysis of the merits to determine whether to dismiss the appeal as interlocutory. *Id.* We ultimately determined statements at issue in that case made during an "out-of-court press conference during pending litigation are too far afield to be considered 'made in due course of a judicial proceeding' " to justify invocation of the absolute privilege against defamation suits. *Id.* at 628, 842 S.E.2d at 106 (citation omitted). As such, there we dismissed the appeal as interlocutory. *Id.*

¶ 20 Turning to this case, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). "Whether an interlocutory appeal affects a substantial right is determined on a case-by-case basis." *Grant v. High Point Reg'l Health Sys.*, 172 N.C. App. 852, 853, 616 S.E.2d 688, 689 (2005) (citation omitted).

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¶ 21 Here, unlike in *Topping*, Defendants' claim of absolute privilege does not arise from an out-of-court press conference, but rather rests on Defendants' contention their allegedly defamatory statements were made in the course of election protests, which Defendants maintain were quasi-judicial proceedings, to which the absolute privilege is applicable. Thus, on the facts of this case, we conclude—to the extent the trial court's Summary Judgment Order dismissed Defendants' absolute privilege defense and declined to grant Summary Judgment to Defendants on this defense— Defendants have established that the trial court's Order affects a substantial right, which may be lost absent immediate review. Therefore, this Court has appellate jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) to consider the merits of this otherwise interlocutory appeal.² N.C. Gen. Stat. § 1-277(a) (2019); § 7A-27(b)(3)(a).

Issues

¶ 22 The key issues for decision are whether: (I) the election protests at issue in this case constituted quasi-judicial proceedings to which the absolute privilege against defamation suits may apply; and (II) the absolute privilege applies to bar this libel action against any of the Defendants in this case.

Analysis

¶ 23 “Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Hidalgo v. Erosion Control Servs., Inc.*, 272 N.C. App. 468, 471, 847 S.E.2d 53, 55 (2020) (quotation marks omitted) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)). Likewise, we apply de novo review to a trial court's conclusions on the applicability of absolute privilege. *Topping*, 270 N.C. App. at 619, 842 S.E.2d at 100-01.

I. Applicability of Absolute Privilege to Election Protest Proceedings

¶ 24 [2] Our analysis begins with two threshold matters. The first is the applicability of absolute privilege to statements made in the due course of an election protest generally. The second is Plaintiffs' contention state-

2. Defendants have also filed, in the alternative, a Petition for Writ of Certiorari requesting we review the merits of their case in the event we determine Defendants have no right of immediate appeal. Resting on our conclusion the Order appealed from affects a substantial right and, thus, immediate appeal of this issue is permitted, we dismiss the Petition for Writ of Certiorari as moot.

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ments made in the course of these specific election protests should not be afforded absolute privilege because Defendants' challenges to individual voters were improperly brought as election protests and not based on the conduct of the election as a whole, and were thereby irrelevant to an election protest proceeding.

¶ 25 “The general rule is that a defamatory statement made in the due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice.” *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954) (citation omitted). “Our courts have held that statements are ‘made in due course of a judicial proceeding’ if they are submitted to the court presiding over litigation or to the government agency presiding over an administrative hearing and are relevant or pertinent to the litigation or hearing.” *Burton v. NCNB Nat’l Bank of N.C.*, 85 N.C. App. 702, 705, 355 S.E.2d 800, 802 (1987) (citations omitted). To determine whether an allegedly defamatory statement was made in the due course of a judicial proceeding, our courts have, therefore, applied a two-step analysis: “[i]n deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding.” *Harman v. Belk*, 165 N.C. App. 819, 824, 600 S.E.2d 43, 47 (2004) (citation omitted).

¶ 26 As to the question of the applicability of absolute privilege to election protests generally: “[t]he phrase ‘judicial proceeding’ in the context of absolute privilege . . . encompasses quasi-judicial proceedings.” *Topping*, 270 N.C. App. at 625, 842 S.E.2d at 104 (citation omitted); *see also Angel v. Ward*, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979) (“The privilege attending communications made in the course of judicial proceedings has been extended to protect communications in an administrative proceeding only where the administrative officer or agency in the proceeding in question is exercising a judicial or quasi-judicial function.” (citation omitted)).

¶ 27 Here, the election protests were filed with the respective County Boards of Elections under the alleged authority of N.C. Gen. Stat. § 163-182.9 in existence in 2016³ and utilizing the form promulgated by the State Board of Elections. Our Supreme Court has recognized the State Board of Elections acts as a quasi-judicial body in the context

3. In 2017, these statutes were recodified by S.L. 2017-6. In 2018, S.L. 2017-6 was repealed effective 31 January 2019 by S.L. 2018-146. Thus, the current statutes are apparently in-line with the statutes in effect following the 2016 election.

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of considering protests concerning the conduct of an election. *Ponder v. Joslin*, 262 N.C. 496, 501, 138 S.E.2d 143, 147 (1964) (“The State Board of Elections is a quasi-judicial agency and may . . . investigate alleged frauds and irregularities in elections in any county upon appeal from a county board or upon a protest filed in apt time with the State Board of Elections[.]”). Moreover, our Court has also previously approved a definition of “quasi-judicial” in the absolute privilege context as: “[a] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.” *Angel*, 43 N.C. App. at 293, 258 S.E.2d at 792 (quotation marks omitted; alteration in original) (quoting Black’s Law Dictionary 1411 (4th ed. rev. 1968)). By statute, a County Board of Elections considering an election protest must: (a) ascertain whether there is probable cause for the protest; (b) provide notice of hearing of the protest; (c) conduct some form of evidentiary hearing which must be recorded; and (d) make findings of fact and conclusions of law based on the evidence presented. N.C. Gen. Stat. § 163-182.10 (2016).

¶ 28 Thus, election protest proceedings before County Boards of Elections fall squarely in the category of quasi-judicial proceedings. *Cf. Rotruck v. Guilford Cnty. Bd. of Elections*, 267 N.C. App. 260, 264, 833 S.E.2d 345, 349 (2019) (stating a County Board of Elections sits as a quasi-judicial body in reviewing a voter registration challenge); *Knight v. Higgs*, 189 N.C. App. 696, 699, 659 S.E.2d 742, 745 (2008) (stating a County Board of Elections sits as a quasi-judicial body in deciding to remove a voter from rolls). Therefore, statements made or submitted to a County Board of Elections in an election protest are statements made in the course of a quasi-judicial proceeding. Consequently, as a general principle, absolute privilege applies to defamatory statements made in the course of an election protest filed with a County Board of Elections.

¶ 29 [3] Next, Plaintiffs argue, however, the allegedly defamatory statements contained in the election protests made by Defendants were so far outside the bounds of the proper scope of an election protest proceeding to render the statements insufficiently relevant or pertinent to the election protest proceeding. Plaintiffs contend the election protests in this case, in fact, merely disputed the eligibility of individual voters and, thus, should properly be classified as untimely voter challenges and not election protests. Plaintiffs specifically assert a proper election protest, as defined in N.C. Gen. Stat. § 163-182(4), is one which relates to the overall “conduct of the election.” Rather, Plaintiffs claim the protests filed across the state at the behest of the Defense Fund challenging the eli-

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gibility of individual voters actually constituted voter challenges under N.C. Gen. Stat. §§ 163-84 and 163-87, which were required to be made on or before Election Day. Indeed, Plaintiffs note, during the course of the election protests filed on behalf of the McCrory campaign following the 2016 General Election, the State Board of Elections issued its own determination making this distinction and administratively ruling County Boards of Elections “shall dismiss a protest of election that merely disputes the eligibility of a voter” unless it was a timely-filed voter challenge or, in fact, there were sufficient ineligible votes cast to potentially impact the outcome of an election.

¶ 30 Defendants here were aware at the time the protests were filed challenging individual voters that those protests—even if they all had merit—would not have impacted the outcome of the election. Nevertheless, Defendants, pointing to cases from other jurisdictions, argue that, even though the election protests filed in Guilford and Brunswick Counties were meritless, absolute privilege should still apply. *See, e.g., Mixter v. Farmer*, 215 Md. App. 536 (slip op. at *6), 81 A.3d 631, 635 (2013) (“[U]nder Maryland law, even a meritless complaint is privileged and the complainant’s motive is immaterial.” (citation omitted)); *Barker v. Huang*, 610 A.2d 1341, 1345-46 (Del. 1992) (“We therefore hold that no ‘sham litigation’ exception to the defense of absolute privilege exists under the law of Delaware.”).

¶ 31 For purposes of determining whether the absolute privilege applies to the election protest filings at issue in this case, however, it is unnecessary to resolve the question of whether those filings were valid election protests. Applying North Carolina law, “the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety.” *Jones v. Coward*, 193 N.C. App. 231, 233, 666 S.E.2d 877, 879 (2008) (quoting *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954)). “If it is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling.” *Scott*, 240 N.C. at 76, 81 S.E.2d at 149.

¶ 32 Here, even absent any indication that the ultimately disproven allegations of individual voter irregularities in this case would have altered the outcome of the election, for purposes of applying absolute privilege, however, they were at least related to the subject matter of the controversy such that they may have “become the subject of inquiry in the course” of the administrative hearing. *See id.* Certainly, we cannot conclude they were so “palpably irrelevant” to an election protest that “no

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reasonable man [could] doubt [their] irrelevancy or impropriety.” *See id.* This is underscored by the fact the State Board of Elections issued its determination concluding individual voter challenges not impacting the outcome of an election were not properly brought as election protests only after—and in light of—the filing of these and other protest forms at the behest of the Defense Fund and the McCrory campaign. Consequently, on the Record and facts before us, absolute privilege applies to the election protests containing the allegedly defamatory statements in this case.

II. Applicability of Absolute Privilege to Defendants

¶ 33 **[4]** Having determined absolute privilege applies to election protest proceedings before County Boards of Elections and to the putative election protests at issue in this case, the question becomes whether Defendants are entitled to the protection of the absolute privilege for the allegedly defamatory statements made here. Application of the absolute privilege here merits separate analyses for (A) Porter, (B) the Law Firm Defendants, and (C) the Defense Fund. We address each in turn.

A. Porter

¶ 34 “The public policy underlying this privilege is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits.” *Harman*, 165 N.C. App. at 824, 600 S.E.2d at 47 (citation and quotation marks omitted). Consistent with this public policy, our Courts have then recognized the absolute privilege applies to statements by participants in judicial and quasi-judicial proceedings made within the scope of those proceedings. For example, this Court has noted:

The scope of the accompanying absolute privilege has been held to include not only statements made by judge, counsel and witnesses at trial, but also statements made in pleadings and other papers filed in the proceeding, out-of-court affidavits or reports submitted to the court and pertinent to the proceedings, communications in administrative proceedings where the officer or agency involved is exercising a quasi-judicial function, and out-of-court statements between parties to a judicial proceeding, or their attorneys, relevant to the proceedings.

Harris v. NCNB Nat’l Bank of N.C., 85 N.C. App. 669, 673, 355 S.E.2d 838, 842 (1987).

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¶ 35 In this regard then, absolute privilege most clearly applies to Defendant Porter. Porter was the actual protestor in the Guilford County Protest filed against Bouvier and the Niehans. The allegedly defamatory statements made by Porter were those adopted by him and made on the protest form filed with the Guilford County Board of Elections upon which he authorized his signature as a party. *See id.* at 674, 355 S.E.2d at 842 (“The absolute privilege extends to parties to the litigation.”). Thus, Porter is entitled to the protection of absolute privilege from suit in this case. Therefore, the trial court erred in denying Summary Judgment for Porter and granting partial Summary Judgment for Plaintiffs on his defense of absolute privilege.

B. Law Firm Defendants

¶ 36 For their part, the Law Firm Defendants advocate for a broad application of the absolute privilege. Specifically, the Law Firm Defendants argue—largely in the passive voice—that because their allegedly defamatory statements were included in election protest forms filed with the respective County Boards of Elections, they necessarily benefit from the absolute privilege. The Law Firm Defendants further assert that this is so even though they were not “participants” in the election protest proceedings, going so far as to argue there is no requirement that one be a “participant” in a legal proceeding to receive the benefit of the absolute privilege against a defamation suit based upon statements made in the due course of a legal proceeding.

¶ 37 Our analysis of this issue folds back into the question of whether the allegedly defamatory statements made by the Law Firm Defendants in this case were made in the course of a legal proceeding. Indeed, in *Topping*, our Court recently concluded participants in a lawsuit were not entitled to absolute immunity for allegedly defamatory statements made outside of their actual participation in the lawsuit. *Topping*, 270 N.C. App. at 624, 842 S.E.2d at 104. In that case, we declined to extend absolute privilege to a party’s attorneys for statements made at an “out-of-court press conference[] during pending litigation.” *Id.* (citation omitted). In fact, our Court reasoned even defamatory statements that “‘mirror’ allegations made in a filed complaint[] deviate from and stray too far beyond the core and ‘occasion’ of speech to invoke immunity from suit.” *Id.* at 624, 842 S.E.2d at 103. “Such immunity cannot be justified by asserted public interest beyond encouraging frankness and protecting testimony, communications between counsel *inter se* or with the court, and participation within the judicial proceeding.” *Id.* at 624, 842 S.E.2d at 103-04.

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¶ 38 Our decision in *Topping* provides guidance in this case. *Topping* acknowledged the general policy behind absolute privilege is to protect “[p]articipants in the judicial process” such that they may be able to “testify or otherwise take part without being hampered by fear of defamation suits.” *Id.* at 624, 842 S.E.2d at 103 (quotation marks omitted) (quoting *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 879). This Court, in turn, reaffirmed “an attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.” *Id.* at 620, 842 S.E.2d at 101 (quotation marks omitted) (quoting *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 879 (quoting Restatement (Second) of Torts § 586 (1977))).

¶ 39 As such, even when attorneys are participants in a judicial proceeding, the absolute privilege only extends to statements made during the course of their participation in (or in preliminary matters related to) those proceedings. *Id.* Thus, absolute privilege does not apply to allegedly defamatory statements made by an attorney when they are not participating in the judicial proceeding. *See id.*; *see also Oparaugo v. Watts*, 884 A.2d 63, 81 (D.C. 2005) (“Thus, merely acting as an attorney is insufficient; the attorney must participate as counsel in the relevant proceeding.”).

¶ 40 In this case, the Law Firm Defendants have disclaimed acting as attorneys for the protestors in the election protest proceedings. They did not appear at the hearings before the Guilford and Brunswick County Boards of Elections on the protests. In fact, it does not appear the Law Firm Defendants were licensed or authorized to practice law in North Carolina at the time the election protests were filed. As such, the allegedly defamatory statements attributed to the Law Firm Defendants were not made while they were participating as counsel in the election protest proceeding.

¶ 41 On appeal, the Law Firm Defendants, however, argue that even if they were not acting as counsel for the protestors, they were nevertheless participating in the election protest proceedings because they were acting as Porter’s and Agovino’s “agents” in drafting and filing the protests with the County Boards of Elections, thereby initiating the quasi-judicial proceedings. To the extent there is a distinction here between the Law Firm Defendants acting as attorneys for the protestors or merely as their “agents” in drafting and filing documents initiating quasi-judicial proceedings, it is one without a difference. *See Topping*, 270 N.C. App. at 622, 842 S.E.2d at 102 (“Where the relation of attorney

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and client exists, the law of principal and agent is generally applicable.” (quotation marks omitted) (quoting *Bank v. McEwen*, 160 N.C. 414, 420, 76 S.E. 222, 224 (1912))). The Law Firm Defendants’ assertion is also undermined by the Record, including, for example, Attorney Roberts’s deposition testimony in which not only did he testify he was not acting as Porter’s attorney in filing the Guilford County Protests but was also not acting as Porter’s “attorney in fact.”

¶ 42 Indeed, the Law Firm Defendants make no argument they were mere couriers, process servers, private investigators employed by the protestors, or paralegals engaged to prepare legal filings, expert witnesses or any other type of “agent” of Porter and Agovino in this case. To the contrary, the Record here reflects in drafting and disseminating election protests in counties throughout North Carolina—including the Guilford and Brunswick County Protests in this case—the Law Firm Defendants were actually acting in their capacity as counsel to the Defense Fund, leaving the individual protestors to initiate and prosecute the actual protest proceedings pro se. In that capacity, the Law Firm Defendants were not participating in the election protests when they prepared the allegedly defamatory statements in this case and aided in recruiting individuals to actually prosecute those protests.⁴

¶ 43 Thus, the statements attributed to the Law Firm Defendants were not made by the Law Firm Defendants in the course of a quasi-judicial proceeding and are not entitled to the protection of the absolute privilege against defamation suits. See *R. H. Bouligny, Inc. v. United Steelworkers of Am., AFL-CIO*, 270 N.C. 160, 171, 154 S.E.2d 344, 354 (1967) (“The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances. The judge, legislator or administrative official, when speaking or writing apart from and independent of the functions of his office, is liable for slanderous or libelous statements upon the same principles applicable to other individuals.”). Therefore, the trial court did not err in denying Summary Judgment for the Law Firm Defendants and in granting partial Summary Judgment for Plaintiffs on the defense of absolute privilege.

4. The Law Firm Defendants also argue that, if they are not deemed participants in the election protest, this necessarily defeats Plaintiffs’ libel claims against them because then they cannot be deemed to have “published” the allegedly defamatory statements contained in the protests. We do not address this contention. Rather, we simply conclude, assuming the evidence reflects the Law Firm Defendants made defamatory statements about Plaintiffs and caused those statements to be published to third parties, the Law Firm Defendants are not entitled to the protection of absolute privilege because they were not making and disseminating these statements in the course of their participation in an election protest proceeding.

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C. The Defense Fund

¶ 44 In its briefing to this Court,⁵ the Defense Fund argues persuasively for the application of absolute privilege to Porter but offers no independent basis for the application of absolute privilege to itself. The Defense Fund makes no argument that it was a party, witness, potential witness, or acting in any representative capacity in the course of the election protest proceeding or any other person or entity to which the absolute privilege has previously been applied by our Courts. Moreover, the Defense Fund does not argue it was participating in the election protest proceeding.

¶ 45 Indeed, the Record here reflects the Defense Fund expressly made the decision not to take part in the election protest proceedings. Instead, the Defense Fund authorized the Law Firm Defendants to prepare the election protests containing false and allegedly defamatory accusations of voter fraud against Plaintiffs, use those allegations to recruit individuals like Porter and Agovino, and convince them to adopt those accusations and file protests based on those false statements. Thus, because the Defense Fund was not participating in the election protest proceeding and, indeed, makes no argument the allegedly defamatory statements attributed to it were made by the Defense Fund in the due course of the election protest proceedings, the Defense Fund is not entitled to the absolute privilege defense in this case. Therefore, the trial court did not err in denying Summary Judgment for the Defense Fund and granting partial Summary Judgment for Plaintiffs on the defense of absolute privilege.

Conclusion

¶ 46 Accordingly, for the foregoing reasons, we affirm the trial court's Summary Judgment Order, in part, to the extent it denied Summary Judgment for the Law Firm Defendants and the Defense Fund on the defense of absolute privilege and granted Summary Judgment for the Plaintiffs against those Defendants on the defense of absolute privilege. We reverse the portion of the trial court's Summary Judgment Order to the extent it denied Porter Summary Judgment on the defense of absolute privilege and granted Summary Judgment for the Plaintiffs against Porter as to his absolute immunity defense. We remand the matter to the trial court with instructions to enter judgment for Porter consistent with this opinion and to permit the parties to pursue further proceedings in this case.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

5. The Defense Fund did not appear at oral argument.

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CONNIE BUTTERFIELD AND TRACIE CAVENESS AS CO-ADMINISTRATORS OF THE ESTATE
OF TODD L. CAVENESS, PLAINTIFFS

v.

HAYLEE GRAY, RN, SOUTHERN HEALTH PARTNERS, INC., VICKIE SHAW, R.T.
ADCOCK, SHERIFF CALVIN WOODARD, JR., WILSON COUNTY, AND HARTFORD
FIRE INSURANCE COMPANY, DEFENDANTS

No. COA20-218

Filed 5 October 2021

Immunity—governmental—liability insurance—waiver of immunity—inmate death

Where an inmate in a county detention center died from dehydration and malnutrition and his estate brought claims against multiple defendants (two detention officers, the county sheriff, and the county), defendants' purchase of liability insurance did not waive their governmental immunity because the policy in question specifically stated that it did not waive immunity. The sheriff's governmental immunity was waived only to the extent of the \$20,000 coverage in his sheriff's bond, which he had purchased to comply with N.C.G.S. § 162-8.

Appeal by Defendants Vickie Shaw, R.T. Adcock, Sheriff Calvin Woodard, Jr., and Wilson County from order entered 22 October 2019 by Judge R. Allen Baddour in Wilson County Superior Court. Heard in the Court of Appeals 2 September 2021.

Abrams and Abrams, P.A., by Douglas B. Abrams and Noah B. Abrams, and Henson & Fuerst, by Rachel A. Fuerst, for Plaintiffs-Appellees.

Womble Bond Dickinson (US), LLP, by Bradley O. Wood, for Defendants-Appellants Vickie Shaw, R.T. Adcock, Sheriff Calvin Woodard, Jr., and Wilson County.

Crumley Roberts, LLP, by Karonnie R. Truzy, for Amicus Curiae, North Carolina Advocates for Justice.

COLLINS, Judge.

This appeal arises from the death of Todd Caveness while in the custody of the Wilson County Detention Center. Following Caveness'

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death, Connie Butterfield and Tracie Caveness, as the co-administrators of his estate (“Plaintiffs”), sued Vickie Shaw and R.T. Adcock, in their individual capacities and in their official capacities as Wilson County Sheriff’s Detention Officers; Calvin Woodard, Jr., in his individual capacity and in his official capacity as the Sheriff of Wilson County; and Wilson County (collectively “Defendants”). Plaintiffs also brought claims against Southern Health Partners (“SHP”), the contractor providing medical care at the Detention Center; Haylee Gray, a nurse employed by SHP; and the Hartford Fire Insurance Company, the surety on Sheriff Woodard’s statutory bond purchased pursuant to N.C. Gen. Stat. § 162-8.¹

¶ 2 Defendants appeal from an order denying their motions for summary judgment on Plaintiffs’ official capacity claims against Shaw, Adcock, and Sheriff Woodard, and Plaintiffs’ claims against Wilson County.² Shaw, Adcock, and Sheriff Woodard each argue that governmental immunity bars Plaintiffs’ official capacity claims against them to the extent that Plaintiffs seek to recover in excess of the amount of Sheriff Woodard’s official bond. The County also argues that governmental immunity bars Plaintiffs’ claims against it and that it cannot be held liable for the actions of its co-defendants. Together, Defendants argue that Plaintiffs may not assert a direct claim under the North Carolina Constitution, because Plaintiffs have an adequate remedy at law that is not barred by governmental immunity. We dismiss Defendants’ argument regarding Plaintiffs’ direct constitutional claim and the County’s argument concerning its liability for the acts of its co-defendants because Defendants have not shown a basis for immediate appellate review of these issues. Because Defendants are entitled to the defense of governmental immunity, we reverse the order denying Defendants’ motions for summary judgment on the remaining issues.

I. Factual Background and Procedural History

¶ 3 Todd Caveness was arrested and confined in the Wilson County Detention Center (“Detention Center”) on 10 January 2016. Caveness entered the Detention Center with documented schizophrenia and anxiety diagnoses. While confined in the Detention Center, Caveness refused food and water, expressing his belief that it had been tampered with. By 2 February 2016, Caveness was weak and had lost approximately 30 pounds since entering the Detention Center. The next day, 3 February

1. The claims against SHP and Gray are not before this Court.

2. The claims against Shaw, Adcock, and Woodard, in their individual capacities, were not subjects of Defendants’ motion for summary judgment and remain in the trial court.

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2016, Caveness was taken from the Detention Center to the hospital, where he died on the morning of 5 February 2016. An autopsy found that he died of a bilateral pulmonary thromboembolism resulting from dehydration and malnutrition.

¶ 4 Plaintiffs instituted this suit on 7 November 2017. Plaintiffs asserted six claims for relief: (1) “negligent and wanton conduct” by Haylee Gray; (2) “vicarious liability and negligent and wanton conduct” by SHP; (3) “negligent and wanton conduct” by Adcock and Shaw; (4) “relief against Sheriff Calvin Woodard, Jr. in his individual and in his official capacity and action on bond against Hartford Fire and Insurance Company”; (5) “violation of [Caveness] constitutional rights”; and (6) “liability of Wilson County.” Plaintiffs’ claim for relief against Sheriff Woodard was premised on three causes of action: wrongful death under N.C. Gen. Stat. § 28A-18-12, an action against the sheriff’s bond under N.C. Gen. Stat. § 58-76-5, and treble damages for injury to a prisoner by a jailer under N.C. Gen. Stat. § 162-55. Plaintiffs also pled that Defendants had waived any applicable immunity.

¶ 5 Defendants answered and raised multiple defenses, including that governmental immunity barred Plaintiffs’ claims. Defendants moved for summary judgment. Adcock, Shaw, and Sheriff Woodard each argued that governmental immunity barred the claims brought against them in their official capacities to the extent that Plaintiffs sought to recover in excess of the amount of Sheriff Woodard’s official bond. Wilson County argued that governmental immunity barred Plaintiffs’ claim against it, and that it could not be held liable for the acts of the other defendants as a matter of law. Defendants collectively argued that the availability of adequate remedies at law foreclosed Plaintiffs’ direct claim under the North Carolina Constitution. Following briefing and argument of counsel, the trial court denied the motions for summary judgment. Defendants timely gave written notice of appeal.

II. Appellate Jurisdiction

¶ 6 The trial court’s order denying Defendants’ motions for summary judgment is interlocutory “because it is not a judgment that ‘disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.’” *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). Parties are generally not entitled to an immediate appeal of an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

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¶ 7 Immediate appeal of an interlocutory order is permitted, however, where the order affects a substantial right. N.C. Gen. Stat. § 1-277(a) (2019). “To confer appellate jurisdiction based on a substantial right, ‘the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.’ ” *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (quoting *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019)); *see also* N.C. R. App. P. 28(b)(4). The appellant has the burden of showing that the order appealed from affects a substantial right. *Coates v. Durham Cnty.*, 266 N.C. App. 271, 273, 831 S.E.2d 392, 394 (2019).

¶ 8 Defendants assert as the sole ground for appellate review that “the denial of a motion for summary judgment grounded on the defense of governmental immunity affects a substantial right and therefore is immediately appealable.” “[I]t is well-established that the denial of a motion for summary judgment grounded on governmental immunity affects a substantial right and is immediately appealable[.]” *Lucas v. Swain Cnty. Bd. of Educ.*, 154 N.C. App. 357, 360, 573 S.E.2d 538, 540 (2002) (citation omitted). We will therefore review the trial court’s denial of Defendants’ motions for summary judgment to the extent the denial concerns the defense of governmental immunity.

¶ 9 Defendants have failed, however, to meet their burden of showing that the denial of summary judgment as to Plaintiffs’ direct constitutional claim is immediately appealable. Defendants fail to address the direct constitutional claim in their statement of grounds for appellate review. In the body of their brief, Defendants argue only that adequate remedies at law foreclose Plaintiffs’ constitutional claim; they do not argue that the constitutional claim is barred by immunity. Accordingly, we lack jurisdiction to address Defendants’ appeal of the trial court’s denial of summary judgment as to the direct constitutional claim and we dismiss Defendant’s appeal of this issue.

¶ 10 Similarly, Wilson County has failed to meet its burden of showing that the denial of summary judgment based on its argument that it could not be held liable for the acts of the other defendants as a matter of law is immediately appealable. Wilson County fails to address this argument as a basis for immediate review in its statement of grounds for appellate review. In the body of its brief, Wilson County advances no argument for immediate review on this basis. Accordingly, we lack jurisdiction to address Wilson County’s appeal of the trial court’s denial of summary judgment based on this theory and we dismiss Wilson’s County’s appeal of this issue.

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III. Standard of Review

¶ 11 We review a trial court's order denying summary judgment de novo. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs.*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). The party moving for summary judgment has the burden of showing that summary judgment is proper. *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287 (1989). The movant may do so "by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

IV. Discussion**A. Governmental Immunity**

¶ 12 Shaw, Adcock, Sheriff Woodard, and Wilson County each argue that governmental immunity bars Plaintiffs' claims.³

¶ 13 Governmental immunity is not only an affirmative defense, "it is a complete immunity from being sued in court." *Ballard v. Shelley*, 257

3. We note that previous decisions of this Court have used the terms "sovereign immunity" and "governmental immunity" interchangeably. See, e.g., *White v. Cochran*, 229 N.C. App. 183, 189, 748 S.E.2d 334, 339 (2013) (stating that "a sheriff is a public official entitled to sovereign immunity" but analyzing whether the sheriff waived "governmental immunity"); *Myers v. Bryant*, 188 N.C. App. 585, 587, 655 S.E.2d 882, 885 (2008) (county sheriff is a public official entitled to "sovereign immunity"). These forms of immunity are, however, distinct: Sovereign immunity applies when the State or one of its agencies is the defendant, *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997), while "[g]overnmental immunity is that portion of the State's sovereign immunity which extends to local governments," *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017). Governmental immunity applies where the defendant is a county or a county agency. *Meyer*, 347 N.C. at 104, 489 S.E.2d at 884. The distinction is salient because "[t]hese immunities do not apply uniformly. The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (citations omitted). Lastly, public official immunity is derivative of governmental immunity, and applies where the public official is sued in his individual capacity. *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016).

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N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018) (quotation marks and citation omitted). Because a suit against a public official in his official capacity operates as a suit against the governmental entity itself, an official sued in this capacity may raise the defense of governmental immunity. *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 420, 573 S.E.2d 715, 719 (2002); *Summey v. Barker*, 142 N.C. App. 688, 690, 544 S.E.2d 262, 265 (2001). A county may also raise the defense of governmental immunity. *Est. of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012).

¶ 14 Under the doctrine of governmental immunity, both a county and a county's public officials⁴ are immune from suits alleging negligence in the exercise of a governmental function, unless the plaintiff shows that the county or county's public officials waived immunity. *Id.* "A county is also generally immune from suit for intentional torts of its employees in the exercise of governmental functions." *Fuller v. Wake Cnty.*, 254 N.C. App. 32, 39, 802 S.E.2d 106, 111 (2017) (citation omitted).

¶ 15 Sheriffs, sheriff's deputies, and jailers have all been recognized as public officials who may avail themselves of the defense of governmental immunity. *Baker v. Smith*, 224 N.C. App. 423, 434, 737 S.E.2d 144, 151; *Phillips v. Gray*, 163 N.C. App. 52, 56-57, 592 S.E.2d 229, 232 (2004); *Summey*, 142 N.C. App. at 691, 544 S.E.2d at 265. Our courts have also long deemed the operation of a county jail to be a governmental function. *Pharr v. Garibaldi*, 252 N.C. 803, 810-11, 115 S.E.2d 18, 24 (1960) ("The . . . operation of prisons and jails, whether by the state, a county, or a municipality, is a purely governmental function, being an indispensable part of the administration of the criminal law . . .") (citations omitted); *Gentry v. Town of Hot Springs*, 227 N.C. 665, 668, 44 S.E.2d 85, 86 (1947) (recognizing governmental immunity for the chief of police and jailer against a claim of wrongful death in the town jail); *Kephart v. Pendergraph*, 131 N.C. App. 559, 563, 507 S.E.2d 915, 918 (1998) ("[T]he actions of a county and its officials in maintaining confinement facilities within the context of law enforcement services are likewise encompassed within the rubric of governmental functions."); *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235 (1990) ("Certain activities are clearly governmental such as law enforcement operations and the operation of jails, public libraries, county fire departments, public parks and city garbage services.").

4. A sheriff is not considered a county public official as our Constitution and statutes provide that each sheriff is an independently elected public official who acts at the county level. N.C. Const. art. VII § 2; N.C. Gen. Stat. § 162-1; *Young v. Bailey*, 368 N.C. 665, 669, 781 S.E.2d 277, 280 (2016); *Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 476, 621 S.E.2d 1, 11 (2005).

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¶ 16 Relying on *Leonard v. Bell*, 254 N.C. App. 694, 803 S.E.2d 445 (2017), and *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 412 S.E.2d 654 (1992), Plaintiffs argue that the provision of medical services to inmates is not a governmental function. Plaintiffs' reliance is misplaced.

¶ 17 In *Leonard*, the plaintiff sued two physicians employed by the Department of Public Safety in their individual capacities, alleging medical malpractice. 254 N.C. App. at 695, 803 S.E.2d at 447. On appeal, the physicians contended that they were entitled to public official immunity. *Id.* at 696, 803 S.E.2d at 447. The sole question on appeal was whether the physicians qualified as public officials, as opposed to mere public employees, and thus were entitled to immunity from suit in their individual capacities. *Id.* at 698, 803 S.E.2d at 449.

¶ 18 This Court held that the physicians did not qualify as public officials and accordingly were not entitled to immunity from suit in their individual capacities. *Id.* at 705, 803 S.E.2d at 453. While the Court “note[d] that there is nothing uniquely sovereign about the health services provided by defendants,” *id.*, this observation pertained only to the treatment provided by the individual physicians themselves—not whether the broader operation of the facility and the provision of medical services within it was a governmental function. Moreover, the basis of Plaintiffs' complaint in this case is Defendants' failure to provide Caveness with adequate medical care while operating the jail and supervising its detainees.

¶ 19 *Medley* is likewise distinguishable. In *Medley*, an inmate brought a medical malpractice claim under the North Carolina Tort Claims Act against the state Department of Correction. 330 N.C. at 838, 412 S.E.2d at 655. The Department of Correction moved to dismiss on the ground that the physician who treated the plaintiff was an independent contractor. *Id.* Our Supreme Court held that the state has a nondelegable duty to provide adequate medical care to inmates. *Id.* at 844, 412 S.E.2d at 659. As such, an independent contractor physician was considered an “agent” for purposes of claims against the state under the North Carolina Tort Claims Act. *Id.* at 845, 412 S.E.2d at 659.

¶ 20 Neither *Leonard* nor *Medley* support the conclusion that Defendants—in their respective roles as an elected sheriff, detention officers, and a county government—were engaged in a proprietary function not subject to governmental immunity. Governmental immunity applies, and Defendants are immune from the claims at issue unless Plaintiffs have shown waiver.

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1. Waiver of Immunity by Liability Insurance

¶ 21 Plaintiffs assert that Defendants waived governmental immunity by purchasing liability insurance. Defendants respond that the provisions of their applicable insurance policy left their governmental immunity intact.

¶ 22 The purchase of liability insurance pursuant to N.C. Gen. Stat. § 153A-435 may waive governmental immunity for both a county and a sheriff. *Patrick v. Wake Cnty. Dep't of Human Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008); *Myers*, 188 N.C. App. at 588, 655 S.E.2d at 885; N.C. Gen. Stat. § 153A-435 (2019). Section 153A-435 provides:

A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment.

N.C. Gen. Stat. § 153A-435(a). “Purchase of insurance pursuant to this subsection waives the county’s governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.” *Id.* Governmental immunity is therefore not waived where the applicable liability insurance policy excludes a plaintiff’s claim from coverage. *Patrick*, 188 N.C. App. at 596, 655 S.E.2d at 923.

¶ 23 In *Patrick*, this Court held that governmental immunity was not waived by the defendant county agency’s purchase of insurance because the policy contained the following exclusion:

This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

Id.

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¶ 24 On multiple occasions since, our Court has held that purchase of similar insurance policies did not waive a defendant's governmental immunity. In *Owen v. Haywood Cnty.*, 205 N.C. App. 456, 697 S.E.2d 357 (2010), we held that immunity had not been waived where the policy excluded from coverage “any claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law.” *Id.* at 460, 697 S.E.2d at 359. Similarly, in *Earley v. Haywood Cnty. Dep’t of Soc. Servs.*, 204 N.C. App. 338, 694 S.E.2d 405 (2010), we held that immunity was not waived where the policy contained an exclusion substantively identical to that in *Owen* and the policy further specified that the parties

intend for no coverage to exist . . . as to any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

Id. at 342, 694 S.E.2d at 409. We reached the same conclusion in *Bullard v. Wake Cnty.*, 221 N.C. App. 522, 729 S.E.2d 686 (2012), where the insurance policy similarly provided that it was

not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

Id. at 527, 729 S.E.2d at 690.

¶ 25 In this case, it is undisputed that a policy provided by the North Carolina Association of County Commissioners (“NCACC Policy”) covered Defendants during the relevant time period. Sections II, V, and VI of the NCACC Policy are pertinent.

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¶ 26 Section II, entitled “General Liability Coverage,” extends certain coverage to the County, its employees, and its volunteers. Section II contains a provision entitled “Immunity” which states:

This Section II of the Contract does not cover claims against a Covered Person against which the Covered Person may assert sovereign and/or governmental immunity in accordance with North Carolina Law. It is the express intention of the parties to this Contract that the coverage provided in this Section of the Contract does not waive the entitlement of a Covered Person to assert sovereign immunity and/or governmental immunity.

Section II also contains an exclusion stating that it “does not apply to any claim or Suit . . . [a]s to which a Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law.”

¶ 27 Section V, entitled “Public Officials Liability Coverage,” extends certain coverage to the County, certain officers of the County, and certain employees of the County. Section V contains a similar provision entitled “Immunity” which states:

The parties to this Contract intend for no coverage to exist under Section V (Public Officials Liability Coverage) as to any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

Section V also contains a similar exclusion stating that it “does not apply to . . . Claims or Suits to which a Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law.”

¶ 28 Finally, Section VI, entitled “Law Enforcement Liability Coverage,” extends coverage to the County, and is the sole portion of the policy extending coverage to the Sheriff, sheriff’s deputies, and other law enforcement personnel. Section VI likewise contains a provision entitled “Immunity” which states:

The parties to this Contract intend for no coverage to exist under this Section VI of the Contract as to any

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claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

Additionally, Section VI contains an exclusion stating that it “does not apply to . . . Claims or Suits to which a Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina Law.”

¶ 29 The NCACC Policy’s immunity provisions and policy exclusions are substantively equivalent—and in many respects identical—to those we held did not waive immunity in *Patrick, Earley, Bullard, and Owen*. The NCACC policy specifically states that the parties to the insurance contract did not intend for the purchase of the coverage to waive immunity for any of the covered parties, did not intend to cover any claims to which an immunity defense applied, and that such claims were excluded from coverage. Accordingly, the NCACC Policy did not waive Defendants’ governmental immunity.

¶ 30 Plaintiffs argue that “the absurd result created by these cases, which in effect spends taxpayer funds for policies that will never pay out on behalf of the named insured, is improper.” But “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

2. Waiver of Immunity by Sheriff’s Bond

¶ 31 Though we conclude that Defendants did not waive immunity by purchasing liability insurance, we must also consider whether Sheriff Woodard waived immunity by purchasing a sheriff’s bond. Pursuant to statute, each sheriff “shall furnish a bond payable to the State of North Carolina for the due execution and return of process, the payment of fees and moneys collected, and the faithful execution of his office as sheriff” N.C. Gen. Stat. § 162-8 (2019). Purchasing a sheriff’s bond as required by N.C. Gen. Stat. § 162-8 waives the sheriff’s governmental immunity, but only “to the extent of the coverage provided.” *White v. Cochran*, 229 N.C. App. 183, 190, 748 S.E.2d 334, 339 (2013); *see also Smith v. Phillips*, 117 N.C. App. 378, 384, 451 S.E.2d 309, 314 (1994) (“[W]aiver of a sheriff’s official immunity may be shown by the existence of his official bond[.]”); *Summey*, 142 N.C. App. at 690, 544 S.E.2d at

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265 (holding sheriff's immunity waived only to the extent of the amount of the bond). To recover on the sheriff's bond, "[e]very person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State" N.C. Gen. Stat. § 58-76-5 (2019).

¶ 32 Sheriff Woodard concedes that he has purchased a \$20,000 bond pursuant to section 162-8. He has therefore waived his governmental immunity for claims up to \$20,000 against the bond, "the extent of the coverage provided." *Cochran*, 229 N.C. App. at 190, 748 S.E.2d at 339.

3. Constitutional Challenge

¶ 33 Plaintiffs appear to argue that governmental immunity violates the North Carolina Constitution. Plaintiffs argue that the amount of damages must be assessed by a jury, and the Constitution "does not permit [] an override of the rights and remedies held by the people when an award of governmental immunity at the summary judgment stage results in a duty left intact without remedy for its breach."

¶ 34 Our Supreme Court has consistently recognized the continued vitality of the doctrine of governmental immunity. *See, e.g., Est. of Williams*, 366 N.C. at 198, 732 S.E.2d at 140 ("Our jurisprudence has recognized the rule of governmental immunity for over a century."). On multiple occasions, the Court has declined to limit or abrogate the doctrine when asked to do so. *See, e.g., Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992) ("The plaintiff asks us either to abolish governmental immunity or to change the way it is applied. . . . We feel that any change in this doctrine should come from the General Assembly."); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 529, 186 S.E.2d 897, 908 (1972) ("We again decline to abrogate the firmly embedded rule of governmental immunity."); *Steelman v. City of New Bern*, 279 N.C. 589, 594, 184 S.E.2d 239, 242 (1971) (declining to follow a "modern trend" of abrogating governmental immunity because "this judge-made doctrine is firmly established in our law today, and by legislation has been recognized by the General Assembly as the public policy of the State."). We are bound by these decisions upholding the doctrine of governmental immunity. *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36 (2003) ("This Court is bound by precedent of the North Carolina Supreme Court.").

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V. Conclusion

¶ 35

We dismiss Defendants’ argument regarding Plaintiffs’ direct constitutional claim and the County’s argument concerning its liability for the acts of its co-defendants because Defendants have not shown a basis for immediate appellate review of these issues. Governmental immunity bars Plaintiffs’ suit against the County and Plaintiffs’ official capacity claims against Shaw and Adcock. Additionally, governmental immunity bars Plaintiffs’ claims in excess of Sheriff Woodard’s statutory bond. The trial court therefore erred in denying Defendants’ motions for summary judgment on those causes of action.

DISMISSED IN PART; REVERSED IN PART.

Judges DIETZ and ZACHARY concur.

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT,
EX. REL., HALEIGH MABE, PLAINTIFF
v.
JUSTIN MABE, DEFENDANT

No. COA20-347

Filed 5 October 2021

1. Appeal and Error—interlocutory orders—substantial right—res judicata—paternity

In a child support case in which the issue of paternity was raised, the appellate court invoked Appellate Rule 2 to consider the Child Support Enforcement Agency’s argument raised in its reply brief that the interlocutory order continuing hearing of a “Motion to Modify/Order to Show Cause” affected a substantial right, in that the issue of paternity had previously been adjudicated. The appellate court elected to consider the merits of the appeal in order to prevent manifest injustice.

2. Paternity—children born out of wedlock—challenges—proper motion

In a child support case in which defendant’s paternity of a child had previously been adjudicated, the appellate court held that, even assuming defendant and the mother were not married at the time the child was born so that N.C.G.S. § 49-14(h) was applicable, the

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word “paternity” being written on defendant’s motion to modify child support did not meet the standard of a “proper motion” pursuant to section 49-14(h), and defendant failed to allege any proper legal basis for requesting paternity testing to challenge the prior adjudication of paternity.

Appeal by plaintiff from order entered 23 October 2019 by Judge Tonia A. Cutchin in District Court, Guilford County. Heard in the Court of Appeals 23 February 2021.

Deputy County Attorney Taniya D. Reaves, for plaintiff-appellant.

Melrose Law, PLLC, by Adam R. Melrose, for defendant-appellee.

STROUD, Chief Judge.

- ¶ 1 Plaintiff appeals a continuance order. Because defendant did not file a proper motion pursuant to North Carolina General Statute § 49-14 to challenge the prior adjudication of paternity, we reverse and remand.

I. Background

- ¶ 2 On or about 3 July 2014, Guilford County Child Support Enforcement Agency, (“CSEA”) on behalf of Ms. Haleigh Mabe (“Mother”) filed a IV-D complaint against defendant Mr. Justin Mabe for child support. The complaint alleged Ms. Mabe was the “caretaker” of the minor child, and Mr. Mabe was the father of the minor child. A copy of the child’s birth certificate was attached to the complaint, and it lists Mother as the child’s mother; the blank for “father” states: “*HUSBAND INFORMATION REFUSED[.]*” (Emphasis added.) Defendant was served with the summons and complaint on 7 July 2015, but he failed to answer or file any responsive pleading.
- ¶ 3 On 24 November 2015, the trial court entered a default judgment against defendant establishing child support. The order includes both a finding of fact and a conclusion of law that defendant was the father of the minor child. The child support order also decreed that, “[p]aternity is established between the Defendant and child[.]” Defendant did not appeal from the child support order.
- ¶ 4 After entry of the child support order, in February of 2016, CSEA filed a “motion for order to show cause” for defendant’s failure to pay his child support. (Capitalization altered.) On 25 February 2016, the trial court entered an order for defendant to appear and show cause. From

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our record at least three show cause orders were entered by the trial court, although none of the orders in our record were served. Several continuance orders were also entered.¹

¶ 5 On 23 September 2019, defendant filed a *pro se* motion to modify child support, using 2003 AOC form AOC0CV0200, Rev. 3/03.² Defendant identified the “circumstances [that] have changed” as the basis for modification of his child support obligation as “RECALL ORDER FOR ARREST & PATERNITY[.]” Thus, it appears that defendant’s “motion for modification” was actually requesting recall of an order for arrest and raising an issue regarding paternity.

¶ 6 On 22 October 2019, the trial court held a hearing based on defendant’s motion for recall of the arrest order and “paternity[.]” (Capitalization altered.) At the hearing, defendant argued that his name was not on the birth certificate and he did not “know nothing about the kid and she won’t let me speak to him or nothing” as the basis for challenging paternity. By order entered 22 October 2019, the trial court recalled defendant’s order for arrest issued on 12 December 2017. On 23 October 2019, the trial court entered a continuance order, continuing hearing of “a Motion to Modify/Order to Show Cause” to 8 January 2020. The trial court found that the continuance was requested “[f]or the Defendant (sic) request for a paternity test be scheduled and monitor compliance for the Order to Show Cause.” CSEA appeals.

II. Interlocutory Order

¶ 7 **[1]** CSEA contends the trial court erred in ordering DNA testing to establish paternity because paternity was already established in 2015.

1. On 10 October 2017, defendant appeared for hearing on one of the prior orders to show cause. The hearing was continued based upon defendant’s agreement to pay \$184 that day and \$100 for each of the three following months. The continuance order required defendant to appear in court for hearing on 12 December 2017. Defendant failed to appear and an order for arrest was issued.

2. The statutory authorities noted on this form are North Carolina General Statutes §§ 50-13.7 and -13.10. North Carolina General Statute § 50-13.7 governs a motion for modification of child support based upon “a showing of changed circumstances” and is “subject to the limitations of G.S. 50-13.10[.]” N.C. Gen. Stat. § 50-13.7 (2019), which provides in part that “[e]ach past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either: (1) Before the payment is due or (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.” N.C. Gen. Stat. § 50-13.10 (2019).

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While CSEA contends the appeal is from “a final judgment[,]” the order on appeal is not a final order but an order to continue the hearing on defendant’s “modification” motion and on an order to show cause. *Turner v. Norfolk Southern Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (“A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” (citation and quotation marks omitted)). As the order appealed is a continuance order setting a new hearing date for defendant’s motion to modify child support and to “monitor compliance for the Order to Show Cause[,]” the order is interlocutory as it “is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.” *Id.* (citation and quotation marks omitted). The very name, *continuance* order, indicates that the action is being continued until a later time. (Emphasis added.)

There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.

Id. (citation omitted).

¶ 8

The trial court has not certified the order for immediate appeal under Rule 54, and thus CSEA’s only method for review is demonstrating a substantial right. *See generally id.*

A substantial right is one which will clearly be lost or irretrievably adversely affected if the order is not reviewable before final judgment. The right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. Our courts have generally taken a restrictive view of the substantial right exception. *The burden is on the appealing party to establish that a substantial right will be affected.*

Id. at 142, 526 S.E.2d at 670 (emphasis added) (citation and quotation marks omitted).

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¶ 9 In CSEA's original brief, CSEA contended the order was final, in the sense that the order required paternity testing, and CSEA contends there is no legal basis for paternity testing as the court had already established paternity in 2015. According to CSEA, the order "is void *ab initio*" because it was entered without subject matter jurisdiction on the specific issue of paternity. CSEA's legal nullity argument stems from the contention that there was no cognizable motion pending before the trial court. However, defendant's "motion to modify" was before the trial court for hearing, as was stated in the "NOTICE OF HEARING" placing the issue before the trial court, although we agree that defendant's "motion to modify" was substantively not a motion for modification. CSEA seems to be contending the trial court did not have *authority* to order paternity testing, but that is a different question than whether it had jurisdiction. Even CSEA admits the "cases cited [in its brief] go towards the paternity issue being *res judicata*[" CSEA contends *res judicata* "overlaps with the issue of subject matter jurisdiction because subject matter jurisdiction is not captured when the issue has already been litigated placing the matter in the *res judicata* bin."

¶ 10 The confusion in this argument was perhaps caused by the use of forms intended for different purposes, so the titles and statutory references do not coincide with the substance of the documents. The "motion to modify" was not really a motion for modification of child support based upon a change of circumstances, and the trial court's "CONTINUANCE ORDER" is really an order for paternity testing. But looking to the substance of the "motion to modify" and the "order for continuance," this case does present an issue of *res judicata*.

¶ 11 Furthermore, we acknowledge an important procedural feature of this particular case on appeal. Defendant appeared *pro se* and initially did not file a responsive brief. This Court *sua sponte* offered defendant the opportunity to participate in the North Carolina Appellate Pro Bono Program. Defendant accepted, and an attorney was appointed to represent him on appeal. Thereafter, his attorney filed a brief on his behalf. By order entered 9 February 2021, this Court allowed CSEA to file a reply brief and scheduled this case for oral argument.

¶ 12 Out of an abundance of caution, we invoke North Carolina Rule of Appellate Procedure 2 to consider the substantive arguments in CSEA's reply brief in order "[t]o prevent manifest injustice to a party [and] to expedite decision in the public interest[.]" N.C. R. App. P. 2. Rule 2 allows this Court "except as otherwise expressly provided by these rules [to] suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]" Dismissal of this appeal as interlocutory based

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upon a technical argument regarding the timing of CSEA's assertion of a substantial right, particularly in a case where the briefing schedule was altered by the *sua sponte* appointment of *pro bono* counsel by this Court, would not serve to "expedite decision in the public interest[.]" *Id.* Instead, dismissal would harm the public interest because of the importance of clarity and finality in establishment of paternity to both parent and child. The General Assembly has recognized the importance of this public interest in finality of paternity adjudications in North Carolina General Statute § 49-14, which allows challenge to a prior adjudication of paternity only under specific, well-defined circumstances. Thus, to the extent review of the order on appeal is not appropriate under Rule 28(h) regarding reply briefs, review would be appropriate "[t]o prevent manifest injustice" to the mother and child in this case and "in the public interest" of this State in the finality of parentage once established. *Id.* Accordingly, under Rule 2, we consider CSEA's substantial rights argument presented in its reply brief.

¶ 13 An argument of *res judicata* may involve a substantial right. *See Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) ("[A] motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Defendant's motion simply seeks to relitigate an issue which was already adjudicated. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable."). In this case, the parties are the same, and defendant's motion was filed in the very same case in which paternity was already adjudicated, so there is no question of whether this is the "same claim" or the same parties for purposes of *res judicata*. *Id.* We conclude finality of a paternity adjudication by a prior court order demonstrates a substantial right which may be adversely affected if review were delayed. Once paternity has been established, CSEA should not have to litigate the claim again unless defendant has presented a valid legal basis to challenge the prior adjudication. Accordingly, we consider CSEA's appeal.

III. Paternity

¶ 14 [2] Defendant contends he is entitled to challenge the trial court's prior adjudication of paternity under North Carolina General Statute § 49-14(h). North Carolina General Statute § 49-14(h) provides,

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(h) Notwithstanding the time limitations of G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an order of paternity may be set aside by a trial court if each of the following applies:

- (1) The paternity order was entered as the result of fraud, duress, mutual mistake, or excusable neglect.
- (2) Genetic tests establish the putative father is not the biological father of the child.

The burden of proof in any motion to set aside an order of paternity shall be on the moving party. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the court shall order the child's mother, the child whose parentage is at issue, and the putative father to submit to genetic paternity testing pursuant to G.S. 8-50.1(b1). If the court determines, as a result of genetic testing, the putative father is not the biological father of the child and the order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect, the court may set aside the order of paternity. *Nothing in this subsection shall be construed to affect the presumption of legitimacy where a child is born to a mother and the putative father during the course of a marriage.*

N.C. Gen. Stat. § 49-14(h) (2019).

¶ 15

Even if we were to assume North Carolina General Statute § 49-14(h) could be applicable to defendant, we disagree with defendant that the word “paternity” on the motion to modify and his few statements before the trial court qualify as a “proper motion[.]” *Id.* North Carolina General Statute § 49-14(h) sets out the required showing for a putative father to seek paternity testing and specifically places the burden of proof to establish a basis to order testing upon the father by filing a “proper motion” alleging that the paternity order was entered “as the result of fraud, duress, mutual mistake, or excusable neglect.” *Id.* Here, defendant’s written motion purportedly sought to modify child support based

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upon changed circumstances, and the word “paternity” on the modification motion does not meet the standard set by North Carolina General Statute § 49-14(h).³ *See generally id.* Even in his statements to the trial court at the hearing, defendant did not identify any factual basis to support a claim “of fraud, duress, mutual mistake, or excusable neglect.” *Id.* Defendant simply asked for DNA testing without any statutory or factual basis. But paternity had already been adjudicated by the trial court, and the order was entered on 24 November 2015; defendant did not appeal the order. Accordingly, we must reverse the trial court’s order as defendant did not file a “proper motion” with the requisite allegations. *Id.*

¶ 16 Furthermore, we must note that defendant’s ability to file a “proper motion” under North Carolina General Statute § 49-14(h) depends upon whether the child was born while the parties were married. It is unclear from the record if and when the parties were married to one another and if and when that marriage was terminated. The complaint did not allege that the child was born during the marriage, and the child support order did not include any finding of fact regarding the marital status of the parents. CSEA’s argument essentially assumes that the parents were married at the time of the child’s birth. Nothing in the record directly contradicts the assumption that the child was born to the marriage of the parties, but nothing in the record establishes this fact either. The only information in our record indicating the child may have been born to the marriage is that the parents have the same last name and that the child’s birth certificate had a note that Mother’s husband’s information was refused, indicating that she reported she had a husband at the time of the child’s birth.

¶ 17 Defendant’s claim that he is entitled to paternity testing is based upon North Carolina General Statute § 49-14, which is within Article 3 of the General Statute regarding, “CIVIL ACTIONS REGARDING CHILDREN BORN OUT OF WEDLOCK[.]” At the beginning of North Carolina General Statute, § 49-14, subsection (a), addresses the cases in which the statute applies: “The paternity of a child born out of wedlock” N.C. Gen. Stat. § 49-14(a) (2019) (emphasis added). In addition, subsection (h) of North Carolina General Statute § 49-14 makes it clear that this provision does not apply if the child was born during the marriage of the parents: “Nothing in this subsection shall be construed to affect the presumption of legitimacy where a child is born to a mother

3. The word “paternity” also does not meet the statutory basis for modification of child support based upon a change of circumstances set forth by North Carolina General Statute § 50-13.7, which was the statutory authority noted on defendant’s motion.

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and the putative father during the course of a marriage.” N.C. Gen. Stat. § 49-14(h). Thus, North Carolina General Statute § 49-14(h) would not be applicable to defendant if the child was born during his marriage to Mother. However, nothing in our record establishes this fact, and thus this Court cannot determine whether defendant may be entitled to seek relief under North Carolina General Statute § 49-14(h). We hold only that the motion for modification was not a “proper motion” under North Carolina General Statute § 49-14(h), even if we assume *arguendo* that defendant and Mother were not married at the time of the child’s birth.

¶ 18 Accordingly, we reverse the trial court’s order and remand for further proceedings. Specifically, on remand the trial court shall enter an order dismissing defendant’s purported motion for DNA testing and motion to modify as the motion did not allege changed circumstances under North Carolina General Statute § 50-13.7 or any grounds for relief under North Carolina General Statute § 49-14(h) and schedule a new hearing date for the “Order to Show Cause” which was also continued by the order of continuance.

IV. Conclusion

¶ 19 Because defendant has failed to demonstrate any legal basis for requesting paternity testing to challenge the trial court’s prior adjudication of paternity, the trial court erred by ordering paternity testing. We reverse and remand for further proceedings as described above.

REVERSED and REMANDED.

Judges MURPHY and GRIFFIN concur.

HULL v. BROWN

[279 N.C. App. 570, 2021-NCCOA-525]

EHREN HULL, PLAINTIFF

v.

TONY McLEAN BROWN, DEFENDANT

No. COA20-748

Filed 5 October 2021

Appeal and Error—interlocutory appeal—motion to transfer—three-judge panel—facial constitutional challenge

In an action asserting claims for alienation of affection and criminal conversation (together, “covenant claims”), and intentional and negligent infliction of emotional distress, defendant’s appeal from an order denying his motion to transfer the case per Civil Procedure Rule 42(b)(4) for a three-judge panel to review his facial constitutional challenge to N.C.G.S. § 52-13 (codifying the covenant claims as actionable) was dismissed as interlocutory. Although the denial of a motion to transfer may be immediately appealable as affecting a substantial right, here, defendant could not show he was deprived of a substantial right where statutory mandatory transfer rules did not apply because not all issues unrelated to the constitutional challenge had yet been resolved. Further, nothing prevented defendant from raising the constitutional challenge before a three-judge panel if the covenant claims survived summary judgment.

Appeal by defendant from order entered 17 September 2020 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 25 August 2021.

Homesley and Wingo Law Group, PLLC, by Andrew J. Wingo and Kyle L. Putnam, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and Caroline T. Mitchell, for defendant-appellant.

TYSON, Judge.

I. Background

¶ 1

Ehren Hull, (“Plaintiff”) commenced this action against Tony Brown (“Defendant”) asserting claims for alienation of affection and criminal conversation (together, “covenant claims”) regarding Plaintiff’s wife. Plaintiff also brought claims for negligent infliction of emotional distress

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(“NIED”), and intentional infliction of emotional distress (“IIED”) (together, “emotional distress claims”).

¶ 2 Defendant timely filed his Motion to Dismiss and Request for Transfer to the Superior Court of Wake County for Determination by a Three-Judge Panel (“Motion”) pursuant to N.C. R. Civ. P. 42(b)(4). In the Motion, Defendant sought: (1) dismissal of Plaintiff’s covenant claims on the basis the statute purportedly codifying them, N.C. Gen. Stat. § 52-13, is facially unconstitutional; and, (2) expeditious transfer of such constitutional challenge for resolution by a three-judge panel. The Motion failed to show the following statutory amendments changed any of the common law elements of either tort. The statute establishes:

(a) No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiffs spouse physically separate with the intent of either the plaintiff or plaintiffs spouse that the physical separation remain permanent.

(b) An action for alienation of affection or criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.

(c) A person may commence a cause of action for alienation of affection or criminal conversation against a natural person only.

N.C. Gen. Stat. § 52-13 (2019).

¶ 3 The trial judge made extensive findings of fact and conclusions of law and denied Defendant’s transfer request and his motion to dismiss Plaintiff’s covenant claims.

¶ 4 At the close of the hearing, Defendant moved to certify this matter for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The trial court denied the motion and did not certify for immediate review.

¶ 5 Defendant filed and served: (1) his responsive pleading; (2) his objections and responses to Plaintiff’s first request for admission; and, (3) his Notice of Appeal from the trial judge’s ruling.

II. Issues

¶ 6 Defendant raises two issues on appeal. First, whether the trial court erred by denying his motion to transfer based upon his purported facial

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constitutional challenge to the covenant claims. Second, whether the trial court erred by denying Defendant's motion to dismiss because it lacked jurisdiction to adjudicate the merits.

III. Jurisdiction

¶ 7 Defendant argues his interlocutory appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2019).

Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment . . . Essentially a two-part test has developed[:] the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.

Goldston v. American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citations and internal quotation marks omitted).

[T]he 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Qualified Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

¶ 8 Defendant argues the trial court's order affects a substantial right: the right to transfer to a three-judge panel, as promulgated by statute.

¶ 9 A litigant has a right to immediately appeal from an interlocutory order denying a motion to transfer a matter from a statutorily improper venue to a statutorily proper venue. *See, e.g., Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right.").

¶ 10 Defendant appeals pursuant to Rule 42, and "[w]e must be mindful of the longstanding 'presumption [] that the legislature was fully cognizant of prior and existing law within the subject matter of its enactment.' " *State v. Daw*, 277 N.C. 240, 2021-NCCOA-180, ¶ 39, 860 S.E.2d 1, 12 (2021) (citation omitted). "The avoidance of one trial is not ordinarily

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a substantial right.” *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citation omitted).

IV. Trial Court’s Compliance with Rule 42

¶ 11 Defendant argues “any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4)[.]” N.C. Gen. Stat. § 1-267.1 (2019). Rule 42(b)(4) provides in relevant part:

[A]ny facial challenge to the validity of an act of the General Assembly . . . shall be heard by a three-judge panel in the Superior Court of Wake County . . . if such a challenge is raised by the defendant in the defendant’s answer, responsive pleading, or within 30 days of filing the defendant’s answer or responsive pleading. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel *if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case.* The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act’s facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act’s facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2019) (emphasis supplied).

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¶ 12 Rule 42 requires the transfer for the facial constitutional challenge should not happen until “after” a trial on the other unaffected claims in the lawsuit. *Id.*

¶ 13 In *Holdstock v. Duke*, this Court held:

The trial court also has to determine what issues, if any, are *not* “contingent upon the outcome of the challenge to the act’s facial validity[,]” and *resolve those issues before deciding whether it is necessary to transfer the facial challenge to the three-judge panel.*

Holdstock v. Duke Univ. Health Sys., Inc., 270 N.C. App. 267, 281, 841 S.E.2d 307, 317 (2020) (citation omitted) (emphasis in original and supplied).

¶ 14 This Court further held in *Holdstock*:

[I]f the trial court had found reason to grant summary judgment in favor of either Plaintiffs or Defendants, based upon matters not contingent on Plaintiffs’ facial challenge, the trial court would not have transferred Plaintiff’s facial challenge to a three-judge panel because the underlying action would have already been decided in full. However, if the trial court had decided all matters not “contingent upon the outcome of” resolution of Plaintiffs’ facial challenge, but matters contingent on resolution of the facial challenge remained “in order to completely resolve” the action, the trial court would have been required, “on its own motion, [to] transfer that portion of the action challenging the validity of [Rule 9(j)] . . . for resolution by a three-judge panel[.]”

Id. at 278–79, 841 S.E.2d at 315. (citation omitted).

¶ 15 Defendant argues Plaintiff’s claims in this action for alienation of affections, criminal conversation, NIED, and IIED involve the same facts, the same damages, and all seek compensatory and punitive damages for all four claims, so the same jury must hear all four claims pursuant to N.C. Gen. Stat. § 1D-30 (2019) (stating “the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages . . . The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to

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punitive damages.”). Defendant overstates the nature of these four categories of claims.

¶ 16 Nothing prevents Defendant from raising the constitutionality of the covenant claims before a three-judge panel after all other issues in the case are resolved. If the claims subject to constitutional challenge survive summary judgment on other grounds, a jury may determine the damages of each cause of action separately while Defendant preserves its right to raise the constitutional issues before the three-judge panel before the trial court enters a final judgment. Because not all matters have been fully resolved, the statutory mandated transfer provisions of N.C. Gen. Stat. §§ 1-267.1 & 1-81.1 and Rule 42(b)(4) do not apply. This interlocutory appeal is premature.

V. Conclusion

¶ 17 Rule 42 requires all non-contingent matters to be resolved before the facial challenge can be resolved. N.C. Gen. Stat. § 1A-1, 42(b)(4). Once “all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made[.]” *Id.*

¶ 18 Defendant has not shown any “deprivation of that substantial right . . . [to] potentially work injury to [Defendant] if not corrected before appeal from final judgment.” *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

¶ 19 This appeal is interlocutory and dismissed. *It is so ordered.*

DISMISSED.

Judges DIETZ and GRIFFIN concur.

MILONE & MacBROOM, INC. v. CORKUM

[279 N.C. App. 576, 2021-NCCOA-526]

MILONE & MacBROOM, INC., PLAINTIFF

v.

KYLE V. CORKUM, ET AL., DEFENDANTS

No. COA20-921

Filed 5 October 2021

1. Appeal and Error—interlocutory orders—writ of certiorari—serious question that might escape review

The appellate court invoked Appellate Rule 2 and issued a writ of certiorari pursuant to Appellate Rule 21 to review an interlocutory order that was not entitled to immediate appeal but that raised a serious question, regarding the trial court's exercise of jurisdiction in supplemental proceedings, that might otherwise escape review.

2. Judgments—supplemental proceedings—subject matter jurisdiction—no writ of execution issued

The trial court lacked statutory authority—and thus subject matter jurisdiction—to grant relief pursuant to Chapter 1, Article 31 (“Supplemental Proceedings”) of the General Statutes where plaintiff had obtained a judgment against defendants but no writ of execution was issued to enforce the judgment or returned unsatisfied, in whole or in part, before plaintiff undertook the supplemental proceedings. The trial court's order compelling defendant to respond to discovery issued pursuant to Article 31 and imposing sanctions was vacated.

Appeal by Defendant from Order entered 5 March 2020 by Judge Michael J. Denning in Wake County District Court. Heard in the Court of Appeals 11 August 2021.

Smith, Debnam, Narron, Drake, Saintsing & Myers, LLP, by Byron L. Saintsing and Thomas A. Gray, for plaintiff-appellee.

Akins, Hunt, Atkins, P.C., by Donald G. Hunt, Jr., and Kristen Atkins Lee, for defendants-appellants.

HAMPSON, Judge.

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Factual and Procedural Background

¶ 1 Kyle Corkum (Defendant) appeals from the trial court's Order granting Milone & MacBroom, Inc.'s (Plaintiff) Motion to Compel responses to Plaintiff's post-judgment discovery requests in supplemental proceedings, denying Defendant's Motion for a Protective Order, and indicating the trial court's intent to award Plaintiff attorneys' fees as a Rule 11 sanction against Defendant. By prior Order of this Court, this appeal was consolidated for the "purpose of hearing only" under N.C. R. App. P. 40 with Plaintiff's subsequent appeal in COA20-922 taken after the trial court entered a later order imposing monetary sanctions against Defendant pursuant to Rule 11 in the amount of \$8,500.00. The Record before us tends to reflect the following:

¶ 2 On 30 October 2012, as memorialized in a Statement Authorizing Entry of Judgment (Statement), Plaintiff entered into an agreement with Defendant, individually, and with Defendant as the manager of a number of Limited Liability Companies (LLCs) for payment of monies owed by Defendant and the LLCs for "services, capital, and equipment" in the total amount of \$2,500,000. The parties agreed that Defendant and the LLCs would authorize entry of judgment against them for the full \$2,500,000, but Plaintiff would not record the judgment if Defendant and the LLCs made a series of quarterly payments beginning in December 2012 and concluding in March 2019 totaling \$1,402,000. Defendant and the LLCs made payments under the agreement—paying \$1,138,500 towards their obligation—before defaulting in September 2018.

¶ 3 As a result of this default by Defendant and the LLCs, on 23 October 2018, Plaintiff filed the Statement and a supporting affidavit with the Wake County Clerk of Superior Court and the clerk's office entered a Confession of Judgment, pursuant to Rule 68.1 of the North Carolina Rules of Civil Procedure, against Defendant and the LLCs in Plaintiff's favor in the full amount of \$2,500,000 with interest. A few days later, on 30 October 2018, Plaintiff filed a Certificate of Credit on Judgment noting Defendant and the LLCs payments of \$1,138,500 and crediting the payments towards the Judgment.

¶ 4 The Record before us does not reflect any writ of execution was issued or returned unsatisfied in whole or part, and it appears there was no further effort to execute on the judgment. Nevertheless, on 26 March 2019, Plaintiff served Interrogatories to Supplemental Proceedings and Request for Production of Documents, pursuant to N.C. Gen. Stat. §§ 1-352.1 and 1-352.2, on attorneys Plaintiff believed were Defendant's counsel. Plaintiff filed a Motion to Compel in Wake County District

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Court on 7 May 2019 alleging Defendant had not responded to its interrogatories and request for production.¹ Plaintiff withdrew its Motion to Compel on 26 July 2019. In addition, also on 26 July 2019, Plaintiff served a new set of interrogatories and requests for production on Defendant.

¶ 5 On 8 August 2019, Defendant filed a Motion to Dismiss for Lack of Jurisdiction, Insufficiency of Process and Improper Service of Process and Failure to Comply with N.C. Gen. Stat. §§ 1-352.1 and 1-352.2, in the Alternative, Motion for Protective Order, Motion to Dismiss and for Protective Order captioned as filed in Wake County Superior Court. Plaintiff subsequently filed a second Motion to Compel in Wake County District Court on 27 November 2019.²

¶ 6 Both parties' Motions came on for hearing in Wake County District Court on 27 February 2020. Following the hearing, the trial court entered an Order granting Plaintiff's Motion to Compel and denying Defendant's Motion for a Protective Order on 5 March 2020.³ In addition, the trial court's Order stated it was awarding Plaintiff attorneys' fees under N.C. R. Civ. P. 11 as a sanction for Defendant seeking a protective order but did not set the amount of fees. Defendant filed written Notice of Appeal of the trial court's Order on 10 March 2020.

ISSUE

¶ 7 The dispositive issue in this appeal is whether the trial court had subject-matter jurisdiction to issue orders in supplemental proceedings in aid of execution where no writ of execution was issued or returned unsatisfied in whole or in part.

ANALYSIS

¶ 8 **[1]** As a threshold matter, although Plaintiff does not argue this Court lacks appellate jurisdiction to hear this case, Defendant acknowledges the trial court's Order granting Plaintiff's Motion to Compel could be construed as an interlocutory discovery order not, generally, directly immediately appealable. Indeed, as a general proposition, "an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment." *Benfield v. Benfield*,

1. This Motion to Compel was captioned as being filed "In the Court of Common Pleas District Court Division[.]"

2. Again, captioned as being filed in the "Court of Common Pleas District Court Division[.]"

3. This Order also is captioned as in "The Court of Common Pleas District Court Division."

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89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988) (citations omitted). Similarly, as a general matter, an appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded. *Triad Women's Ctr., P.A. v. Rogers*, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660 (2010).

¶ 9 Here, on the Record before us, compliance with the trial court's 5 March 2020 Order granting Plaintiff's Motion to Compel has not been enforced by sanctions. Moreover, the trial court's 5 March 2020 Order imposing Rule 11 sanctions on Plaintiff for opposing the Motion to Compel is not an appealable Order because it does not award an amount of attorneys' fees. *In re Cranor*, 247 N.C. App. 565, 569, 786 S.E.2d 379, 382 (2016) ("Where an order imposes judicial discipline, an appeal from such order is interlocutory if the order involves the imposition of attorneys' fees and if the *amount* of the fee award was not set in the order."). Thus, Defendant's appeal is interlocutory and, we conclude—in the absence of any argument before this Court of an established privilege being asserted by Defendant, any sanction imposed for failure to comply with the Order compelling discovery, or a specific amount of attorneys' fees awarded under Rule 11—the trial court's 5 March 2020 Order does not affect a substantial right. Therefore, Defendant is not entitled to an immediate appeal from the 5 March 2020 Order.

¶ 10 Nevertheless, and in the alternative, Defendant also requests this Court to treat his appeal as a Petition for Writ of Certiorari and allow review on the merits. While the better practice would have been for Defendant to file a separate Petition for Writ of Certiorari compliant with N.C. R. App. P. 21, we exercise our discretion to invoke N.C. R. App. P. 2 to vary the Rules of Appellate Procedure and allow Defendant's request to consider this appeal as a Petition for Writ of Certiorari notwithstanding the failure to comply with the requirements of N.C. R. App. P. 21. We do so because this case raises serious questions of how and when a trial court may exercise jurisdiction in supplemental proceedings that may otherwise escape review leading to manifest injustice to a party subjected to supplemental proceedings improperly instituted contrary to the express statutory requirements. Having invoked N.C. R. App. P. 2, our decision, then, on whether to issue the Writ of Certiorari necessarily turns on the merits of the appeal. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) ("A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." (citations omitted)).

¶ 11 [2] Defendant argues the trial court lacked subject-matter jurisdiction over the supplemental proceedings. "Subject matter jurisdiction, a

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threshold requirement for a court to hear and adjudicate a controversy brought before it, is conferred upon the courts by either the North Carolina Constitution or by statute.” *Burgess v. Burgess*, 205 N.C. App. 325, 327-28, 698 S.E.2d 666, 668 (2010) (citation and quotation marks omitted). We review challenges to subject-matter jurisdiction de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

¶ 12 “Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal.” *Burgess*, 205 N.C. App. at 328, 698 S.E.2d at 668-69 (quoting *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff’d*, 362 N.C. 170, 655 S.E.2d 712 (2008)). “Although defendant made no arguments concerning subject matter jurisdiction before the trial court, a party may raise the issue at any stage of a proceeding.” *Composite Tech., Inc. v. Advanced Composite Structures (USA), Inc.*, 150 N.C. App. 386, 389, 563 S.E.2d 84, 85 (2002) (citation omitted). “This Court may also raise the issue even if neither party has addressed the matter.” *Id.* Indeed, here, we discern a fundamental jurisdictional defect in the institution of the supplemental proceedings in this case which neither party has identified either below or in this Court: no writ of execution was issued to enforce the Judgment or returned unsatisfied in whole or in part prior to Plaintiff undertaking supplemental proceedings.

¶ 13 In an early opinion discussing statutory supplemental proceedings, our Supreme Court recognized statutory supplemental proceedings served to replace the prior Creditor’s Bill in equity. *Rand v. Rand*, 78 N.C. 12, 14-15 (1878) (“We think it clear that proceedings supplementary to execution under the Code of Procedure are a substitute for the former creditor’s bill, and are governed by the principle established under the former practice in administering this species of relief in behalf of judgment creditors.”). The Court recognized: “The object of the proceeding is to compel the application of property concealed by the debtor, or which from its nature cannot be levied upon under execution, to the payment of the creditor’s judgment.” *Id.* at 15. It followed then: “The only purpose of the creditor’s bill was to enforce satisfaction of a judgment out of the property of the judgment debtor when an execution could not reach it, and the only purpose of supplemental proceedings is to attain the same end by the same means.” *Id.*

¶ 14 Article 31 of Chapter 1 of the North Carolina General Statutes contains the current statutes governing supplemental proceedings. The first statute in this article, N.C. Gen. Stat. § 1-352, is titled: “Execution unsatisfied; debtor ordered to answer.” The text of that statute provides:

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When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued.

N.C. Gen. Stat. § 1-352 (2019) (emphases added). Likewise, N.C. Gen. Stat. § 1-352.1 provides a judgment creditor may serve interrogatories on a judgment debtor concerning the debtor's property "at any time the judgment remains unsatisfied, *and within three years from the time of issuing an execution.*" N.C. Gen. Stat. § 1-352.1 (2019) (emphasis added). Further, N.C. Gen. Stat. § 1-352.2 provides for additional methods of discovering assets that may be employed "at any time the judgment remains unsatisfied, *and within three years from the time of issuing an execution[.]*" N.C. Gen. Stat. § 1-352.2 (2019) (emphasis added).⁴

¶ 15

Thus, as our Court explained: "Article 31 provides for supplemental proceedings, equitable in nature, after execution against a judgment debtor is returned unsatisfied to aid creditors to reach property . . . subject to the payment of debts which cannot be reached by the ordinary process of execution. These proceedings are available only after execution is attempted." *Massey v. Cates*, 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968). In fact, our Supreme Court, applying a prior version of the statutes, expressly answered the question: "Can supplemental proceedings be instituted against a defendant when there has been no execution issued within three years from the institution of such supplementary proceedings?" *Int'l Harvester Co. of Am. v. Brockwell*, 202 N.C. 805, 806

4. By way of further examples: N.C. Gen. Stat. § 1-353 allows for a judgment creditor "[a]fter issuing an execution against property" to seek an order requiring the judgment debtor to appear if the debtor is deemed to be "unjustly refus[ing]" to apply property towards the judgment; N.C. Gen. Stat. § 1-354 provides for "Proceedings supplemental to execution" upon the "return of an execution unsatisfied" against joint debtors.

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164 S.E. 322, 322 (1932). The Court recognized: “A reading of the statutes discloses that a supplemental proceeding is based upon an execution.” *Id.* As such, based on this reading of the statute the Court held: “if the defendant himself is supplemented, the proceedings must be instituted ‘within three years of the issuing of execution.’ ” *Id.*, 164 S.E. at 323. It is apparent from both the plain language of the supplemental proceeding statutes and our prior case law that a statutory precondition to instituting supplemental proceedings against a defendant is the issuance of a writ of execution and, under Section 1-352, the return of that writ unsatisfied in whole or in part.

¶ 16 In this case, there is nothing in the Record before us which establishes Plaintiff sought issuance of a writ of execution or that any such writ was returned unsatisfied in whole or part. Thus, supplemental proceedings under Article 31 of Chapter 1 of the General Statutes were not available to Plaintiff. Therefore, the trial court lacked statutory authority over these supplemental proceedings and, as such, lacked subject-matter jurisdiction to grant any relief under Article 31 of Chapter 1 of the General Statutes. *See Burgess*, 205 N.C. App. at 327-28, 698 S.E.2d at 668; *see also In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991) (“[B]efore a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.”). Consequently, the trial court erred in entering its 5 March 2020 Order compelling Defendant to respond to discovery issued pursuant to Sections 1-352.1 and 1-352.2 and imposing sanctions under N.C. R. Civ. P. 11 on Defendant for opposing discovery in supplemental proceedings. As such, we further conclude it is appropriate to issue our Writ of Certiorari under N.C. R. App. P. 21 for purposes of vacating the trial court’s 5 March 2020 Order.

Conclusion

¶ 17 Accordingly, for the foregoing reasons, we vacate the trial court’s 5 March 2020 Order granting Plaintiff’s Motion to Compel. We do so, however, without prejudice to any right of Plaintiff to institute supplemental proceedings consistent with Article 31 of Chapter 1 of the North Carolina General Statutes.

VACATED.

Judges ZACHARY and JACKSON concur.

MOLE' v. CITY OF DURHAM

[279 N.C. App. 583, 2021-NCCOA-527]

MICHAEL MOLE', PLAINTIFF

v.

CITY OF DURHAM, NORTH CAROLINA, A MUNICIPALITY, DEFENDANT

No. COA19-683

Filed 5 October 2021

1. Constitutional Law—North Carolina—fruits of their own labor clause—police disciplinary process—failure to follow policy

Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant adequately pled a claim that his employer, the City of Durham, had violated Article I, Section 1's "fruits of their own labor" clause, which applied to the disciplinary action taken against him. His complaint properly stated the claim by alleging that the City had violated its own policy, which was designed to further a legitimate government interest, by failing to give him the minimum 72 hours of notice of his pre-disciplinary conference and that he was thereby injured by having inadequate time to prepare his response.

2. Constitutional Law—North Carolina—due process—police officer terminated—right to continued employment

Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant failed to state a claim that his employer, the City of Durham, had violated his state constitutional right to due process. Employees in the state of North Carolina generally do not have a property interest in continued employment, and the sergeant did not allege that any statute, ordinance, or contract created such an interest.

3. Constitutional Law—North Carolina—equal protection—class of one—police officer terminated

Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant failed to state a claim that his employer, the City of Durham, had violated his state constitutional right to equal protection by subjecting him to disparate

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treatment as compared to similarly situated employees. This type of equal protection claim—a “class of one” claim—cannot be stated in the employment context.

Appeal by Plaintiff from order entered 24 May 2019 by Judge John M. Dunlow in Durham County Superior Court. Heard in the Court of Appeals 10 June 2021.

The McGuinness Law Firm, by J. Michael McGuinness, and Edelstein & Payne, by M. Travis Payne, for Plaintiff-Appellant.

Kennon Craver, PLLC, by Henry W. Sappenfield and Michele L. Livingstone, for Defendant-Appellee.

Essex Richards, P.A., by Norris A. Adams, II, for North Carolina Fraternal Order of Police, amicus curiae.

INMAN, Judge.

¶ 1 In his first experience negotiating the surrender of an armed and barricaded suspect, without another negotiator backing him up, Durham Police Sergeant Michael Mole' might have given up when the suspect's gun discharged at close range. He didn't, and two hours later he had persuaded the suspect to drop his weapon and surrender. The suspect, other citizens, and law enforcement officers were safe. But Sergeant Mole' was fired because he had secured the suspect's surrender by promising to allow him to smoke a marijuana cigarette once in custody, and he made good on the promise immediately following the arrest.

¶ 2 Sergeant Mole' sued the City of Durham, alleging that his employer violated his rights under the North Carolina Constitution. The trial court dismissed his complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

¶ 3 Because the complaint alleges a colorable violation of Article I, Section 1 of the North Carolina Constitution, which protects each person's right to enjoy the fruits of their own labor, we hold the trial court erred in dismissing that claim. We otherwise affirm the trial court because binding precedent precludes a holding that Sergeant Mole' has a constitutionally protected interest in continued employment under theories of due process or equal protection.

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I. FACTUAL AND PROCEDURAL HISTORY

¶ 4 The complaint pleads the following facts:

¶ 5 Sergeant Mole' began working for the Durham Police Department in May 2007. He received hostage negotiation training in May 2014, but he did not negotiate a barricaded subject or hostage situation until the events giving rise to this case.

¶ 6 On 28 June 2016, the Durham Police Department dispatched officers to an apartment in Durham to serve an arrest warrant on Julius Smoot ("Smoot"). After entering the apartment, officers discovered that Smoot had barricaded himself in an upstairs bedroom. Smoot yelled that he had a gun and that he would use it on himself in ten minutes unless he was allowed to see his wife and son. The officers retreated and requested a hostage negotiator.

¶ 7 Sergeant Mole' was the only hostage negotiator on duty at the time. He arrived at the apartment five minutes before Smoot's deadline and began negotiations with the primary goals of extending the deadline and keeping Smoot alive. During these negotiations, Smoot accidentally discharged his firearm.

¶ 8 Sergeant Mole' continued to negotiate with Smoot for approximately two hours. During this time, Smoot said he planned to smoke a "blunt," a marijuana cigarette. Sergeant Mole', reluctant to allow an armed and barricaded subject to impair his mental state, asked Smoot to refrain. Sergeant Mole' promised Smoot that if he disarmed and peacefully surrendered, he would be allowed to smoke the blunt.

¶ 9 Smoot then dropped his gun, handcuffed himself, and surrendered to Sergeant Mole' in the apartment. Still in handcuffs, Smoot asked for his pack of legal tobacco cigarettes and lighter, which were on a nearby table, and Sergeant Mole' handed those items to him. Smoot then pulled a marijuana blunt from behind his ear, lit it with the lighter, and smoked approximately half of it.

¶ 10 The Durham Police Department launched an internal investigation of Sergeant Mole's actions following Smoot's peaceful surrender. On 24 October 2016, approximately four months after the incident, Sergeant Mole' was informed in writing that a pre-disciplinary hearing would take place the next day, despite Durham's written policy requiring advance notice of at least three days. Following the hearing, Sergeant Mole's immediate supervisors recommended that he be reprimanded. But Durham terminated him.

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¶ 11 In November 2018 Sergeant Mole' filed a complaint alleging Durham had violated his state constitutional rights to due process, equal protection, and the fruits of his labor under the North Carolina Constitution. The trial court entered an order granting Durham's motion to dismiss the complaint under Rule 12(b)(6) on 22 May 2019. Sergeant Mole' appeals.

II. ANALYSIS

¶ 12 Sergeant Mole' argues that the facts pled in his complaint support claims for violations of his state constitutional rights to due process, equal protection, and the fruits of his labor. Article I, Section 1 of the North Carolina Constitution, in a provision unique to that document as compared to the federal constitution, protects the people's rights to enjoy the fruits of their own labor. This provision was recently applied by our Supreme Court in *Tully v. City of Wilmington*, 370 N.C. 527, 810 S.E.2d 208 (2018). Following the Supreme Court's reasoning in *Tully*, we hold that Sergeant Mole's complaint adequately pleads a claim for violation of Article I, Section 1. We are constrained by binding precedents to affirm the trial court's dismissal of his remaining constitutional claims.

A. Standard of Review

¶ 13 We review an order granting a 12(b)(6) motion to dismiss *de novo* to determine whether the complaint states a claim under which relief can be granted. *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014). We liberally construe the complaint and take the material factual allegations as true. *Id.* Legal conclusions, unlike factual allegations, are not presumed valid. *Id.*

B. Fruits of One's Labor

¶ 14 [1] Sergeant Mole' argues that his termination violated his right to the fruits of his labor guaranteed by Article I, Section 1 of the North Carolina Constitution. This provision ensures each person the right to "life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness." N.C. Const. art. I, § 1 (emphasis added). Unlike the due process and equal protection provisions of our state constitution, which have been interpreted to provide the same protection as provisions in the federal constitution, this guarantee has no analogous federal constitutional clause. *See infra* Parts II.C (1) and (2).

¶ 15 The "fruits of their own labor" clause was added to our state constitution in 1868. It was adopted the same year the Fourteenth Amendment to the United States Constitution was ratified, at a time when formerly enslaved persons were newly able to work for their own benefit. *See* John V. Orth, *The North Carolina State Constitution with History and*

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Commentary 38 (1995) (recognizing that the clause was “an addition that may have been intended to strike an ideological blow at the slave labor system”).

¶ 16 Our appellate courts did not consider the clause until the 20th century, when it was applied to check the State’s professional licensing powers. *See generally, e.g., State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940) (dry cleaning); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (photography); *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957) (tile installation). These decisions recognized a person’s ability to earn a livelihood as a protected constitutional right and struck down licensing restrictions not rationally related to public health, safety, or welfare and not reasonably necessary to promote a public good or prevent a public harm. *Roller*, 245 N.C. at 518, 96 S.E.2d at 854; *Ballance*, 229 N.C. at 769-70, 51 S.E.2d at 735.

¶ 17 In recent years, our Supreme Court has extended application of the fruits of one’s labor clause beyond licensing restrictions to other state actions that interfere with one’s right to earn a livelihood. *King v. Town of Chapel Hill* held that a town ordinance capping towing fees was arbitrary and violated tow truck drivers’ rights to enjoy the fruits of their labor. 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014). *Tully v. City of Wilmington* held that a municipal police department violated a public employee’s constitutional right to enjoy the fruits of his own labor when it failed to follow its own promotion procedures. 370 N.C. at 539, 810 S.E.2d at 217.

¶ 18 *Tully* involved a Wilmington police officer who was denied a promotion after he failed a mandatory examination that tested an officer’s knowledge of the law. 370 N.C. at 528-29, 810 S.E.2d at 211. His exam answers were correct based on the current state of the law, but he failed the exam because the answer key was outdated. *Id.* Written department policy laid out the promotion and examination procedures and provided that candidates could appeal any portion of the selection process, so the officer sought to appeal his test results. *Id.* at 529-30, 810 S.E.2d at 211. The City of Wilmington refused to hear the officer’s appeal, determining the test results “were not a grievable item” and that nothing could be done. *Id.* at 529, 810 S.E.2d at 211 (quotation marks omitted).

¶ 19 Our Supreme Court held that this denial of process violated the officer’s constitutional rights under Article I, Section 1, reasoning the provision applies “when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place.” *Id.* at

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535-36, 810 S.E.2d at 215. It established the following requirements to plead such a constitutional claim:

[T]o state a direct constitutional claim grounded in this unique right under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation.

Id. at 536-37, 810 S.E.2d at 216.¹

1. Tully and Article I, Section 1 Apply to Mole's Discipline

¶ 20 In deciding whether Sergeant Mole' has asserted a valid Article I, Section 1 claim, we must first resolve whether this state constitutional claim is limited to the "employment promotional process" language used by our Supreme Court in *Tully*. A strict reading of *Tully* would foreclose his claim. However, *Tully* detailed the underlying constitutional injury in that case in terms broader than the promotional process, and the logic employed in that decision applies with equal force to the disciplinary action taken against Sergeant Mole'. Our understanding of *Tully* and its rationale, combined with its instruction to "give our [state] Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property," *id.* at 533, 810 S.E.2d at 214 (citation and quotation marks omitted), leads us to hold that Article I, Section 1 applies to the disciplinary action taken against Sergeant Mole'.

¶ 21 In declaring the existence of a valid claim under Article I, Section 1 in *Tully*, the Supreme Court acknowledged "the right to pursue one's profession free from unreasonable governmental action." *Id.* at 535, 810 S.E.2d at 215. It did so in part based on *Presnell v. Pell*, which recognized an allegedly unreasonable termination of a public school teacher implicated "the right to engage in any of the common occupations of life, unfettered by unreasonable restrictions imposed by actions of the state or its agencies." 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979)

1. The Supreme Court declined to decide the form of remedy to which a successful *Tully* plaintiff is entitled, leaving that to the trial court to determine based on the facts of the case. *Id.* at 538, 810 S.E.2d at 216.

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(citations and quotation marks omitted) (quoted in *Tully*, 370 N.C. at 535, 810 S.E.2d at 214).² *Tully* quoted *Presnell* for the further proposition that “[t]he right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities.” *Tully*, 370 N.C. at 535, 810 S.E.2d at 214-15 (quoting *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617). It is undeniable that unreasonable employee discipline—including termination—by a government employer implicates this same right and raises the same concerns. *See Presnell*, 298 N.C. at 724, 260 S.E.2d at 617.

¶ 22 The Supreme Court in *Tully* ultimately announced that “Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place.” 370 N.C. at 535-36, 810 S.E.2d at 215. In reaching this conclusion, *Tully* relied on the United States Supreme Court’s reasoning in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L. Ed. 681 (1954), and lower court decisions applying *Accardi*. According to *Tully*, *Accardi* and the cases applying it “recognize[] the impropriety of government agencies ignoring their own regulations, albeit in other contexts.” 370 N.C. at 536, 810 S.E.2d at 215 (citing *Accardi*, 347 U.S. at 268, 98 L. Ed. at 687; then citing *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969); and then citing *Farlow v. N.C. State Bd. of Chiropractic Exam’rs*, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1985)).

¶ 23 Decisions recognizing the impropriety of government agencies ignoring their own rules in “other contexts,” though not directly cited in *Tully*,³ include the termination of public employees in violation of internal disciplinary procedures. *See Service v. Dulles*, 354 U.S. 363, 388-89, 1 L. Ed. 2d 1403, 1418 (1957) (applying *Accardi* to reinstate a foreign service officer fired by the Secretary of State despite a federal statute allow-

2. *Presnell* held that the discharged teacher was not denied due process protections, but *Tully* was not resolved on due process grounds. *Tully*, 370 N.C. at 532 n.4, 810 S.E.2d at 213 n.4. The Supreme Court nevertheless relied on *Presnell* in its Article I, Section 1 analysis in *Tully*. *Id.* at 534-35, 810 S.E.2d at 214-15. We rely on *Presnell* to the same extent here.

3. *Tully* cites *Accardi*, *Heffner*, and *Farlow* by way of a “*See, e.g.*,” signal. 370 N.C. at 536, 810 S.E.2d at 215. Courts, practitioners, and legal academics use the signal “*E.g.*,” to show that the “[c]ited authority states the proposition; other authorities also state the proposition, but citation to them would not be helpful or is not necessary.” *The Bluebook: A Uniform System of Citation* R. 1.2(a) (Colum. L. Rev. Ass’n et al. eds., 21st ed. 2020). In other words, *Tully* acknowledges *Accardi*’s application beyond the other two decisions cited.

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ing at-will discharge because the agency violated its own procedures); *Vitarelli v. Seaton*, 359 U.S. 535, 545-46, 3 L. Ed. 2d 1012, 1020-21 (1959) (reinstating employment of a federal security guard under *Accardi* because the agency violated its own procedural rules at his termination hearing). These decisions do not interpret North Carolina law. But just as *Tully* found other decisions applying *Accardi* pertinent, we find the analysis in *Dulles* and *Vitarelli* instructive in our review of *Tully* and, for the reasons above, hold that *Tully's* articulation of Article I, Section 1's protections extends to the discipline of Sergeant Mole'.

2. Sufficiency of Mole's Complaint Under Tully

¶ 24 Having held that the disciplinary procedure at issue here falls within the ambit of *Tully*, we next examine whether the allegations in Sergeant Mole's complaint otherwise satisfy the three elements established by our Supreme Court in that decision.⁴ The first two elements require Sergeant Mole' to allege the existence and violation of an internal employment policy that was "clear [and] established . . . [and] that furthered a legitimate governmental interest." *Tully*, 370 N.C. at 537, 810 S.E.2d at 216.

¶ 25 Sergeant Mole's complaint alleges several policy violations of varying stripes, namely: (1) the acting watch commander failed to deploy the hostage negotiation team, the Special Enforcement Team, or stage fire and emergency medical services; (2) the watch commander negotiated with Smoot without Sergeant Mole's knowledge; (3) an "after-action report/critical incident critique" was not completed; (4) Sergeant Mole' took Smoot into custody because the designated tactical personnel were never deployed; (5) Sergeant Mole' was not offered psychological services following the incident; (6) other officers failed to secure prior written consent to conduct the search that initiated the standoff with Smoot; (7) the incident should have been designated a high-risk warrant service but was not; (8) Sergeant Mole' was not provided quarterly training and he did not meet annually with the department's Special Enforcement Team as required for hostage negotiators; and (9) Durham gave Sergeant Mole' only 24 hours' notice of his pre-disciplinary conference instead of the minimum 72 hours' notice mandated by policy.

¶ 26 The first eight policy violations alleged above put Sergeant Mole' into an untenable position, but they do not state a claim under *Tully*. *Tully* protects public employees from unreasonable violations of *employment* policies, not field operating or training procedures that do not bear upon

4. The complaint asserts, and Durham did not contest before this Court, that Sergeant Mole' has no other remedy in state law.

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internal processes governing the employer-employee relationship. *See Tully*, 370 N.C. at 537, 810 S.E.2d at 216 (“Tully’s allegations show that the City’s actions injured him by denying him a fair opportunity to proceed to the next stage of the competitive promotional process, thereby ‘unfairly impos[ing] [a] stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities.’ ” (quoting *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617) (alteration in original)).

¶ 27 But Sergeant Mole’s allegation that he was given improper and inadequate notice of his pre-disciplinary hearing does fall within Article I, Section 1’s protections. This shortened notice period violated Durham’s own employment disciplinary procedures. Sergeant Mole’ further alleges that these pre-disciplinary procedures were designed to further a legitimate government interest, namely that its employees be treated fairly in the administration of discipline. *Cf. id.* (recognizing “the legitimate governmental interest of providing a fair procedure that ensures qualified candidates move to the next stage of the promotional process”). Sergeant Mole’ has thus pled a redressable violation of his employer’s disciplinary procedures designed to further a legitimate governmental interest, in satisfaction of the first two elements from *Tully*.

¶ 28 Sergeant Mole’ has likewise satisfied the final element, injury, based on a liberal construction of his complaint. Sergeant Mole’ specifically alleges that “[h]ad [he] been afforded his opportunity . . . to prepare at a minimum of three days instead of less than 24 hours, Sergeant Mole’ would have had reasonable notice and could have better prepared and provided a more comprehensive response.” From there, he asserts Durham “failed to comply with mandatory conditions precedent before proceeding with dismissal . . . [and] did not comply with its own stated [disciplinary] policies,” before alleging Durham’s “conduct including actions and omissions in its treatment of Sergeant Mole’ w[as] arbitrary, capricious, irrational and predicated upon selective enforcement of personnel and law enforcement policies and disparate treatment in discipline and thereby deprived Sergeant Mole’ of the fruits of [his] labors.” These allegations are similar to those held adequate to demonstrate a claim in *Tully*, 370 N.C. at 536-37, 810 S.E.2d at 215-16, and we therefore hold Sergeant Mole’ has sufficiently alleged he “was injured as a result of [Durham’s procedural] violation[s].” *Id.* at 537, 810 S.E.2d at 216.⁵

5. Durham argues this procedural violation does not rise to a cognizable constitutional injury based on *Hilliard v. N.C. Dep’t of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14 (2005). *Hilliard* was decided prior to *Tully*, did not involve a claim under Article I, Section 1, and is therefore not controlling on this issue.

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¶ 29 We acknowledge North Carolina's general policy of at-will employment, long established in common law. *See, e.g., Presnell*, 298 N.C. at 723-24, 260 S.E.2d at 616 ("Nothing else appearing, an employment contract in North Carolina is terminable at the will of either party."). We do not hold that Durham could not terminate Sergeant Mole' based on the conduct at issue, or that Durham could not terminate Sergeant Mole' without cause. Given the stage of proceedings, "we express no opinion on the ultimate viability of [Sergeant Mole']s claim." *Id.* at 537, 810 S.E.2d at 216. Like the Supreme Court in *Tully*, "we [do] not speculate regarding whether [Sergeant Mole'] would [not have been terminated] had [Durham] followed its own [disciplinary] policy." *Id.* at 537-38, 810 S.E.2d at 216. At this early stage of litigation, we do not address whether Sergeant Mole' must be reinstated or what relief must be afforded to him should he prevail, as "[i]t will be a matter for the trial judge to craft the necessary relief." *Id.* at 538, 810 S.E.2d at 216 (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, 413 S.E.2d 276, 290-91 (1992)). We only hold that Durham must follow its own disciplinary procedures—created to protect its legitimate governmental interest in treating city employees fairly—in discharging Sergeant Mole'. If the evidence shows that Durham failed to do so and that Sergeant Mole' was harmed by that failure, Article I, Section 1 of our Constitution provides a remedy.

C. Due Process and Equal Protection

¶ 30 We next address the two remaining constitutional claims dismissed by the trial court. As explained below, we affirm the trial court based on precedent.

1. Due Process

¶ 31 [2] The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of the law." U.S. Const. amend. XIV, § 1. The North Carolina Constitution provides that "no person shall be taken, imprisoned, or dis seized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art I, § 19. Our state's "law of the land clause is considered 'synonymous' with the Fourteenth Amendment to the United States Constitution." *Woods v. City of Wilmington*, 125 N.C. App. 226, 230, 480 S.E.2d 429, 432 (1997) (citation omitted). Decisions of the United States Supreme Court as to federal due process are "highly persuasive, but not binding on the courts of this State." *State v. Smith*, 90 N.C. App. 161, 163, 368 S.E.2d 33, 35 (1988).

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¶ 32 In order to succeed on a due process challenge, the plaintiff must first show that he “has been deprived of a protected interest in ‘property’ or ‘liberty.’ ” *Dobrowolska v. Wall*, 138 N.C. App. 1, 11, 530 S.E.2d 590, 598 (2000) (quoting *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59, 143 L. Ed. 2d 130, 149 (1999)). The court must decide whether the interest relates to a fundamental right “rooted in the traditions and conscience of our people.” *Reno v. Flores*, 507 U.S. 292, 303, 123 L. Ed. 2d 1, 17 (1993) (citation and quotation marks omitted). “Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561 (1972). Whether a person’s interest in continued employment falls within the scope of constitutional protection is determined under the law of the state where the person is employed. *Bishop v. Wood*, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 690 (1976).

¶ 33 We are constrained by North Carolina Supreme Court precedent holding that employees in this state generally do not have a property interest in continued employment. *Presnell*, 298 N.C. at 723-24, 260 S.E.2d at 616. The Court in *Presnell* held that this rule applies to both private and public employment. *Id.* (“The fact that plaintiff was employed by a political subdivision of the state does not entitle her to tenure . . .”). The state may create a property interest in employment by statute, ordinance, or express or implied contract. *Id.* at 723, 260 S.E.2d at 616. In the absence of any of these, however, no such interest exists. *Id.* at 723-24, 260 S.E.2d at 616.

¶ 34 Sergeant Mole’ argues Durham’s internal personnel policies established an “indirect or informal” property right in his continued employment. His complaint identifies governing provisions such as Durham’s “Disciplinary and Grievance” policy and its “practice and custom of commensurate discipline.” However, the complaint does not identify any policies that have been incorporated into ordinance or statute or included in Sergeant Mole’s employment contract.

¶ 35 We are bound by precedent holding that policies like those identified by Sergeant Mole’ do not give rise to a protected property interest. In *Wuchte v. McNeil*, this Court held that a Durham police officer, terminated without being afforded procedures provided by the city’s personnel policies, could not state a claim for wrongful termination without evidence that his employment contract, a statute, or an ordinance provided

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that he could only be dismissed for good cause. 130 N.C. App. 738, 741-42, 505 S.E.2d 142, 145 (1998).⁶ We noted that “[a]n employee is presumed to be an employee-at-will absent a definite term of employment or a condition that the employee can only be fired only ‘for cause.’” *Id.* at 740, 505 S.E.2d at 144 (citation omitted). In *Wuchte*, as in this case, the plaintiff relied on personnel policies that had not been enacted as an ordinance, and we held that unilaterally promulgated personnel memoranda did not establish a protected property interest. *Id.* at 742, 505 S.E.2d at 145.⁷

¶ 36 By contrast, in *Howell v. Town of Carolina Beach*, this Court held that a manual adopted by the town as an ordinance granted employees a “reasonable expectation of employment and a property interest within the meaning of the due process clause.” 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992). Sergeant Mole’s complaint does not allege that Durham has codified its personnel policies in an ordinance.

¶ 37 As we noted above, whether an employee has a constitutionally protected interest under the due process clause is not determined by reference to the federal constitution but depends on state law. *Bishop*, 426 U.S. at 344, 48 L. Ed. 2d at 690. Federal courts applying North Carolina law have recognized that personnel rules and regulations merely supply internal administrative guidelines and do not grant a property interest subject to due process protections unless enacted as an ordinance. *Pittman v. Wilson Cty.*, 839 F.2d 225, 229 (4th Cir. 1988); *Dunn v. Town of Emerald Isle*, 722 F.Supp. 1309, 1311 (E.D.N.C. 1989).

¶ 38 Sergeant Mole’ notes that he was granted “permanent employee” status after a probationary period, and his complaint alleges this status grants him the “right to be afforded due process in the disciplinary system.” But without contract provisions setting a term of employment or procedures by which the employment might be terminated, “permanent” employment is presumed to be terminable at the will of either party and does not alone confer a property or liberty interest in continued employment. *Nantz v. Emp’t Sec. Comm’n*, 290 N.C. 473, 477, 226 S.E.2d 340,

6. *Wuchte* was decided two decades prior to *Tully*, strictly on due process grounds. 130 N.C. App. at 744, 505 S.E.2d at 146-47.

7. This Court has previously questioned the rationale of this black-letter law. *See, e.g., Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985) (“[T]here are strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice. Nevertheless, the law of North Carolina is clear that unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it.” (citations omitted)).

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343 (1976). *But see Presnell*, 298 N.C. at 724, 260 S.E.2d at 617 (“The liberty interest here implicated—the freedom to seek further employment—was offended not by her dismissal alone, but rather by her dismissal upon alleged unsupported charges which, left unrefuted, might wrongfully injure her future placement possibilities.”).

¶ 39 Sergeant Mole’ also argues that his dismissal was arbitrary and capricious, giving rise to a claim for violation of his due process rights “to continued employment when Defendant arbitrarily terminated [him].” But our Supreme Court has held that an at-will employee has no right to continued employment, and thus arbitrary conduct by an at-will employer does not state a cognizable violation of the due process protections of the North Carolina Constitution. *See Tully*, 370 N.C. at 538-39, 810 S.E.2d at 216-17 (holding Tully’s allegations that the City of Wilmington “arbitrarily and irrationally deprived [him]” of an alleged “property interest in his employment with the City” failed to state a valid due process claim under the North Carolina Constitution because, per *Presnell*, at-will public employees have no cognizable property interest in continued employment).

¶ 40 To be sure, this Court has recognized violations of state and federal substantive due process protections without requiring the plaintiff allege or demonstrate the deprivation of a recognized property or liberty interest where the State’s conduct was “so egregious that it shocks the conscience or offends a sense of justice.” *Toomer v. Garrett* 155 N.C. App. 462, 470, 574 S.E.2d 76, 84 (2002). But that case, unlike *Tully*, did not involve an employment decision. It instead concerned a state agency’s public disclosure of an employee’s personnel file, including social security number, medical diagnoses, and personal financial data, without any rational relationship to any governmental interest. 155 N.C. App. at 472, 574 S.E.2d at 85.⁸ In contrast to *Toomer*, a holding here that

8. Sergeant Mole’ cites a United States Supreme Court decision holding that Oklahoma state employees’ federal substantive due process protections were violated by their employer’s arbitrary and capricious conduct, without finding that the employees had a property or liberty interest in the employment. *Wieman v. Updegraff* held that a statute requiring state employees to take a loyalty oath asserting they were not affiliated with communist organizations was unconstitutional. 344 U.S. 183, 191, 97 L. Ed. 216, 222 (1952). However, *Wieman* did not specifically address, and lower federal court decisions have not held, that arbitrary termination from at-will employment gives rise to a substantive due process claim. *See, e.g., Darr v. Town of Telluride, Colo.*, 495 F.3d 1243, 1258 (10th Cir. 2007) (observing *Wieman* did not address at-will employment and holding a town could terminate a marshal, even for allegedly arbitrary and capricious reasons, because “[t]he substantive-due-process clause does not forbid a public employer from terminating its at-will employees without cause”); *Singleton v. Cecil*, 176 F.3d 419, 423-24 (8th Cir. 1999) (“[T]he defendants’ alleged arbitrary and capricious firing of Officer Singleton, an at-will employee[,] . . . did not violate his substantive due process rights.”).

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Sergeant Mole's allegedly arbitrary and capricious termination violated his substantive due process rights, without a cognizable property interest in continued employment, would effectively hold that he could not be terminated except for cause. As discussed above, North Carolina employees do not enjoy that substantive due process protection unless it is explicitly incorporated into their employment contract or promulgated by statute or ordinance.

2. Equal Protection

¶ 41 **[3]** Sergeant Mole' also asserts that Durham subjected him to disparate treatment as compared to similarly situated employees. His complaint cites examples of misconduct by other Durham police officers that he alleges were more egregious than the actions that led to his termination.

¶ 42 Both our federal and state constitutions guarantee that individuals receive "the equal protection of the laws." N.C. Const. Art. I, § 19; U.S. Const. amend. XIV, § 1. The equal protection clause of the United States Constitution's Fourteenth Amendment "has been expressly incorporated in Art. I, § 19 of the Constitution of North Carolina," *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971), and the same analysis applies to both. *Toomer*, 155 N.C. App. at 476, 574 S.E.2d at 88; see also *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996) (applying "the same test as federal courts" to determine whether limiting working prisoners' remedy to workers' compensation violates their right to equal protection).

¶ 43 A typical equal protection claim alleges that the plaintiff was treated differently by legislation or a state actor due to their membership in a suspect class: race, color, religion, national origin, etc. See *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601, 170 L. Ed. 2d 975, 985 (2008). Where the treatment varies based upon a suspect class or impacts a fundamental right, we apply strict scrutiny and determine whether the state action is necessary to promote a compelling government interest. *State ex. rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994). The United States Supreme Court and, in turn, North Carolina courts, have also recognized the existence of "class of one" equal protection claims in which plaintiffs allege they were intentionally treated differently from others similarly situated. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (2000); *In re Application of Ellis*, 277 N.C. 419, 424, 178 S.E.2d 77, 80 (1970) (recognizing "the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners"). When the plaintiff is not a member of a suspect class and does not as-

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sert wrongful termination in violation of a fundamental right,⁹ “it is necessary to show only that the classification created by the [government action] bears a rational relationship to some legitimate state interest.” *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505 (citation omitted).

¶ 44 Sergeant Mole' asserts a class-of-one claim by arguing that he was situated similarly to other Durham police officers who violated department policies and received significantly less severe discipline. The United States Supreme Court has recognized this type of claim in relation to real property rights. In *Olech* the Court held the complaint, alleging that the defendant arbitrarily required the plaintiff to cede a larger easement than her neighbors in order to connect to the municipal water supply, was sufficient to state a class-of-one claim. 528 U.S. at 565, 145 L. Ed. 2d at 1063-64. Previous Supreme Court decisions also recognized this type of claim without explicitly identifying the claims as “class-of-one.” See *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 446-47, 67 L. Ed. 340, 343 (1923) (holding that assessing property at 100% of its true value when all other property in the county was evaluated at 55% violated equal protection); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 341-43, 102 L. Ed. 2d 688, 695-96 (1989) (holding assessment methodology that produced “dramatic differences in valuation” between petitioners’ property and comparable surrounding land violated equal protection).

¶ 45 But the United States Supreme Court has held that class-of-one claims cannot be stated in the employment context. In *Engquist*, the plaintiff asserted a class-of-one equal protection claim against her employer, alleging that she was terminated for arbitrary, vindictive, and malicious reasons. 553 U.S. at 595, 170 L. Ed. 2d at 982. A coworker who had personal issues with the plaintiff formed an alliance with an assistant director who had assured a client that the plaintiff would be “gotten rid of.” *Id.* at 594, 170 L. Ed. 2d at 981. The plaintiff was then passed over for a promotion in favor of a less-qualified coworker and told that she could only stay with the department if she accepted a demotion. *Id.* at 595, 170 L. Ed. 2d at 981.

¶ 46 While the Court recognized that the equal protection clause’s protections apply to administrative as well as legislative acts and that states do not escape its requirements in their role as employers, it

9. Fundamental rights recognized by the United States Supreme Court include the right to vote, the right of interstate travel, rights guaranteed by the first amendment such as freedom of expression and religion, and the right to procreate. *Carolina Utility Customers Ass'n*, 336 N.C. at 681 n.6, 446 S.E.2d at 346 n.6 (1994).

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distinguished between the government taking action as a regulator and the government taking action “as proprietor, to manage its internal operation.” *Id.* at 598, 170 L. Ed. 2d at 983 (cleaned up). The *Engquist* Court noted that some forms of state action, including employment decisions, “involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.” *Id.* at 603, 170 L. Ed. 2d at 987. The Court reasoned that as opposed to the regulation of third parties, treating similarly situated employees differently is “par for the course.” *Id.* at 604, 170 L. Ed. 2d at 988. The Court characterized class-of-one claims in the public employment context as “contrary to the concept of at-will employment,” *id.* at 606, 170 L. Ed. 2d at 989, and held that “the class-of-one theory of equal protection has no application in the public employment context[.]” *Id.* at 607, 170 L. Ed. 2d at 989.

¶ 47 We must again consider whether the analogous clause in the North Carolina Constitution is more protective and extends the guarantee of equal protection in the public employment context. As with due process, the fact that the Fourteenth Amendment does not provide a cause of action for Sergeant Mole' does not necessarily foreclose the possibility that our state Constitution could yield a remedy: the United States Constitution is the floor of constitutional protections in North Carolina, not the ceiling. *See State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). The North Carolina Constitution is to be liberally construed, especially the provisions safeguarding individual liberty and property rights. *Tully*, 370 N.C. at 533, 810 S.E.2d at 214.

¶ 48 However, precedent precludes us from unfettered liberal analysis. This Court has clearly and explicitly held that the equal protection rights guaranteed by the North Carolina Constitution are the same as those in the United States Constitution, and the analysis under each is the same. *Toomer*, 155 N.C. App. at 476, 574 S.E.2d at 88. We have searched without success for decisions holding otherwise. Our review reveals no decision in North Carolina recognizing class-of-one claims in the employment context. We are bound by our existing precedent. *Johnson v. State*, 224 N.C. App. 282, 297, 735 S.E.2d 859, 871 (2012). But the final arbiter of the North Carolina Constitution is the North Carolina Supreme Court. *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610, 304 S.E.2d 164, 170 (1983). Because our constitution is to be liberally construed, we urge the Supreme Court to address this issue.¹⁰

10. In dissent, Justice Stevens characterized the *Engquist* majority's exclusion of public employees as applying a “meat-axe” to resolve an issue better addressed with a scalpel. 553 U.S. at 610, 170 L. Ed. 2d at 991. It is not necessary that protections provided by our state constitution exclude the same broad category of claims.

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III. CONCLUSION

¶ 49

For the reasons explained above, we hold that the trial court erred in dismissing Sergeant Mole's claim for violation of his right to the fruits of his labor and reverse that portion of the trial court's order. We affirm the trial court's dismissal of Sergeant Mole's remaining claims. The matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges ZACHARY and CARPENTER concur.

NATION FORD BAPTIST CHURCH INCORPORATED
d/B/A NATIONS FORD COMMUNITY CHURCH, PLAINTIFF

v.

PHILLIP RJ DAVIS, DEFENDANT/THIRD-PARTY PLAINTIFF

v.

JOSEPH DIXON, CHARLES ELLIOT AND DOUGLAS WILLIE, THIRD-PARTY DEFENDANTS

No. COA20-800

Filed 5 October 2021

1. Appeal and Error—interlocutory order—substantial right—First Amendment violation—ecclesiastical abstention doctrine

In a lawsuit arising from an employment dispute between a church and one of its former pastors, in which the pastor filed a counterclaim against the church and a third-party complaint against a group of church elders, the church and the elders (appellants) were entitled to immediate review of their appeal from an interlocutory order denying their motion to dismiss the pastor's claims and granting the pastor's motion to amend his pleadings. The challenged order affected a substantial right where appellants argued that, to resolve the pastor's claims, the court would have to interpret religious matters in violation of the ecclesiastical abstention doctrine stemming from the First Amendment.

2. Churches and Religion—subject matter jurisdiction—ecclesiastical abstention doctrine—termination of pastor's employment

In a lawsuit arising from an employment dispute between a church and one of its former pastors, the ecclesiastical entanglement

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doctrine of the First Amendment did not bar the trial court from reviewing the pastor's counterclaim against the church and third-party complaint against a group of church elders, where the court could resolve the first determinative issue—whether the elders' procedure for firing the pastor violated the church's then-controlling bylaws—by applying neutral principles of law. Although the second determinative issue—whether the elders properly found the pastor was unfit to serve as the church's senior pastor—would require the court to impermissibly engage with ecclesiastical matters, there was no guarantee that the court would have to reach that second issue, which depended on how it resolved the first issue.

3. Jurisdiction—standing—derivative—individual—claims—employment dispute

In a lawsuit arising from an employment dispute between a church and one of its former pastors, the pastor had individual standing to bring his counterclaim against the church and his third-party complaint against a group of church elders, in which he alleged that the church (through the elders) violated then-controlling church bylaws when firing him. A determination of whether the pastor also had standing to bring a derivative action on the church's behalf—seeking money damages from the elders for breaching their fiduciary duties to the church—required a preliminary determination of which church bylaws governed at the relevant time, which could not be made on appeal.

4. Pleadings—motion to amend—Rule 15—counterclaim and third-party complaint—employment dispute

In a lawsuit arising from an employment dispute between a church and one of its former pastors, the trial court did not abuse its discretion by granting the pastor's motion to amend his counterclaim against the church and his third-party complaint against a group of church elders. The church could not show any justifiable reason for denying the pastor's motion, nor did any material prejudice result from the court's decision to grant it.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Plaintiff/Third-Party Defendant from order entered 22 July 2020 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2021.

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Knox, Brotherton, Knox & Godfrey, by Lisa G. Godfrey, H. Edward Knox, and J. Gray Brotherton, for the Plaintiff- and Third-Party Defendants-Appellants.

Nexsen Pruet, PLLC, by James C. Smith and Nicholas T. Pappayliou, for the Defendant/Third-Party Plaintiff-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff Nation Ford Baptist Church Incorporated (the “Church”) and Third-Party Defendants Joseph Dixon, Charles Elliot, and Douglas Willie (together, the “Elders”) appeal the trial court’s order denying their motion to dismiss and granting Defendant and Third-Party Plaintiff Phillip R.J. Davis’s (“Davis”) motion to amend his counterclaim and third-party complaint. The Church and the Elders argue the trial court erred in denying their motion, granting Davis’s motion, and concluding Davis had standing to bring the claims asserted in his counterclaim and third-party complaint.

¶ 2 The primary issue presented in this appeal is whether the resolution of Davis’s claims would require our Courts to interpret religious matters in violation of the ecclesiastical abstention doctrine which stems from the First Amendment to the United States Constitution. We hold that there is no guarantee that our Courts will be forced to weigh ecclesiastical matters at this stage of the proceedings. We affirm the decision of the trial court.

I. Factual and Procedural History

¶ 3 The Church was incorporated as a North Carolina nonprofit corporation in 1988. At the Church’s time of incorporation, the Elders acted as the Board of Directors for the Church. On 31 March 2016, the Elders hired Davis to serve as Senior Pastor for the Church. Davis was employed on an “at-will” basis.” The employment agreement letter signed by Davis on 31 March 2016 set out his terms of employment, in pertinent part, as follows:

An “at-will” employment relationship has no specific duration. This means that an employee can resign their employment at any time, with or without reason or advance notice. *The [C]hurch has the right to terminate employment at any time, with or without reason or advance notice as long as there is no violation of applicable state or federal law.*

(Emphasis added).

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¶ 4 The Record in this case contains two different sets of bylaws, and the parties disagree which bylaws governed the Church's operations during the time relevant to this case. The Church adopted a set of bylaws ("the First Bylaws") on 8 January 1997. On or about April 2008, the Church applied for a bank loan, and incorporated another set of bylaws ("the Second Bylaws") as part of its loan application.

¶ 5 Effective 17 June 2019, the Elders unanimously decided to terminate Davis's employment at the Church. Despite his termination, Davis ignored the instructions of the Church and continued to conduct religious activities at the Church.

¶ 6 The Church initiated this action on 17 September 2019 seeking, *inter alia*, a preliminary injunction to prohibit Davis from accessing the Church. In response, Davis filed an answer, counterclaim, third-party complaint, and motion for injunctive relief on 24 October 2019. Davis's claims are centered around an employment dispute for which the remedy is dependent upon determining which bylaws governed the Church's actions. An order granting the Church's motion for a preliminary injunction was entered on 30 October 2019.

¶ 7 On 22 April 2020, the Church and the Elders filed a motion to dismiss Davis's counterclaim and third-party complaint. Davis moved to amend his answer, counterclaim, and third-party complaint on 6 May 2020. The court entered an order ("the Order") granting Davis's motion to amend and denying the Church and the Elders' motion to dismiss on 22 July 2020. According to the Order,

The [c]ourt finds and concludes that (i) this [c]ourt has subject matter jurisdiction over the matters and claims asserted in [Davis]'s Counterclaim and Third-Party Complaint, (ii) [Davis] has standing to bring the claims asserted in his Counterclaim and Third-Party Complaint, and (ii) [Davis]'s Motion to Amend should be granted.

The Church and the Elders timely appeal.

II. Analysis

¶ 8 The Church and the Elders raise three issues on appeal. First, they contend the trial court erred in concluding that it has subject matter jurisdiction over the matters asserted in Davis's amended counterclaim and third-party complaint. Second, they argue the trial court erred in concluding that Davis has standing to bring the claims asserted in his amended counterclaim and third-party complaint. Third, they assert the

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trial court erred in granting Davis's motion to amend the counterclaim and third-party complaint. We address each issue in turn.

A. Interlocutory Jurisdiction

¶ 9 [1] We acknowledge that this appeal is interlocutory. An interlocutory order is “made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy.” *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citation omitted). There is generally no right to immediately appeal from an interlocutory order. *Id.* Immediate appeal of an interlocutory order is, however, appropriate when “the challenged order affects a substantial right that may be lost without immediate review.” *McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002) (citation omitted).

¶ 10 A “substantial right” is “a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.” *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation and quotation marks omitted). The appellant has the burden of establishing that a substantial right will be affected unless they are allowed to immediately appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

¶ 11 The trial court's Order denying the Church and Elders' motion to dismiss and granting Davis's motion to amend is an interlocutory order. It was made during the pendency of the action and it does not dispose of the case. However, the Church and the Elders argue that their motion to dismiss should have been granted because resolution of Davis's claims would require the trial court to impermissibly entangle itself in ecclesiastical matters in violation of the First Amendment of the United States Constitution. “First Amendment rights are substantial and . . . are implicated when a party asserts that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters.” *Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 569 (2007). “When First Amendment rights are asserted, this Court has allowed appeals from interlocutory orders.” *Id.* (citation omitted).

¶ 12 The Church and the Elders have asserted a violation of First Amendment rights. Their appeal is properly before this Court.

B. Motion to Dismiss for Ecclesiastical Abstention

¶ 13 [2] The Church and the Elders contend the trial court erred in concluding that it had subject matter jurisdiction over the claims asserted in

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Davis's amended counterclaim and third-party complaint because the court would be forced to interpret and resolve ecclesiastical questions to resolve the claims.

¶ 14 The standard of review for a trial court's decision to deny a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is *de novo*. *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004) (citation omitted). When ruling on or reviewing a Rule 12(b)(1) motion to dismiss, our courts may "consider and weigh matters outside of the pleadings." *Id.* (citation omitted). Upon review of a motion to dismiss for lack of subject matter jurisdiction, the trial court must accept the allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 809 (2011) (citations omitted).

¶ 15 The trial court properly determined it had subject matter jurisdiction over Davis's claims. "The First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters." *Id.* at 510, 714 S.E.2d at 810 (citing *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969)). "An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership." *W. Conf. of Original Free Will Baptists of N.C. v. Miles*, 259 N.C. 1, 10–11, 129 S.E.2d 600, 606 (1963) (citations omitted).

¶ 16 However, civil courts do not violate the First Amendment "merely by opening their doors to disputes involving church property." *Presbyterian Church*, 393 U.S. at 449. "And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* "The First Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." *Serbian E. Orthodox Diocese for U.S. of A. and Canada v. Milivojevich*, 426 U.S. 696, 710 (1976) (citation omitted). "This principle applies with equal force to church disputes over church polity and church administration." *Id.* "The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 396, 398 (1998). "If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim." *Id.* (citation omitted). "When a party brings a proper complaint, '[w]here civil,

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contract[[],] or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules.’ ” *Harris v. Matthews*, 361 N.C. 265, 274–75, 643 S.E.2d 566, 572 (2007) (quoting *Atkins v. Walker*, 284 N.C. 306, 320, 200 S.E.2d 641, 650 (1973)).

¶ 17

Davis’s claims request the following:

(I) Declaratory judgment against the Church and the Elders, declaring that: (i) Davis is the “Bishop” and “Senior Pastor” of the Church; (ii) Davis was not an “at-will” employee of the Church; (iii) the Elders’ attempt to terminate Davis’s employment with the Church was unauthorized by the then-controlling Second Bylaws; and (iv) Davis is entitled to recover back-pay and benefits earned since his purported termination;

(II) Preliminary and permanent injunction allowing Davis to resume employment with the Church, earning full compensation and benefits;

(III) Money damages from the Elders for breach of fiduciary obligations owed to Davis and to the Church;

(IV) Money damages from the Elders for wrongful interference with Davis’s employment relationship with the Church;

(V) Rights (i) to inspect the Church’s financial records, (ii) to receive an accounting from the Elders and the Church of Church funds or assets the Elders misappropriated, and (iii) to impose a constructive trust upon the Elders’ assets in an amount equal to any Church funds or assets found to have been misappropriated; and

(VI) Money damages from the Elders for civil conspiracy to remove Davis from employment with the Church and to seize complete control of the Church’s operations.

¶ 18

As Davis asserts, “[t]his is an employment dispute.” The core tenet upon which all of Davis’s claims depend is the determination of which bylaws governed the Church at the relevant time. Davis was an employee of the Church and now raises disputes regarding the Church’s bylaws. His claims do not fall under the protections of ecclesiastical matters within the First Amendment.

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¶ 19 Resolving Davis’s claims requires a two-part determination: First, which bylaws were the governing authority at the relevant time, and whether Davis’s termination was in accordance with the proper bylaws? Second, whether the Elders properly determined that Davis was unfit to serve as Senior Pastor of the Church?

¶ 20 The first determination may be made by applying neutral principles of law without engaging in ecclesiastical matters. *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398. The trial court must first determine which set of bylaws controlled at the relevant time, based solely on contract and business law. The court will then be able to assess whether the Church’s procedure for firing Davis complied with the requirements of the controlling bylaws. The court may determine that the Church’s method of terminating Davis did not comply with the requirements of the controlling bylaws, making Davis’s termination void. In this instance, this dispute would be resolved without the necessity of answering the second question—whether Davis was unfit to serve—and engaging with ecclesiastical matters.

¶ 21 If the court determines that the Church’s method of terminating Davis *did* comply with the requirements of the controlling bylaws, then our Courts would be required to assess whether the Church, through its Elders, properly determined that Davis was unfit to serve as Senior Pastor. That determination cannot be made applying only neutral principles of law. Answering this second question may require an impermissible engagement with ecclesiastical matters, but there is no guarantee at this stage of the proceedings that our courts will be forced to answer this second question.

¶ 22 The first determination required in the present case is analogous to *Tubiolo v. Abundant Life Church, Inc.* The plaintiffs in *Tubiolo* brought claims against the defendant church for wrongful termination, arguing that the persons who sought termination of the plaintiffs lacked the requisite authority to do so. *Tubiolo*, 167 N.C. App. at 326, 605 S.E.2d at 163. The Court in *Tubiolo* was tasked with determining what bylaws governed the actions of the defendant church, and whether the actions taken by the defendant church were in accordance with the appropriate bylaws. *Id.* at 329, 605 S.E.2d at 164. The *Tubiolo* Court noted “the courts do have jurisdiction over the very narrow issue of whether the bylaws were properly adopted by the defendant [church].” *Id.* The *Tubiolo* Court then held, as this Court has previously acknowledged, that it is

proper for a court to address the “very narrow issue” of whether the plaintiffs’ membership was terminated in accordance with the church’s bylaws—whether

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bylaws had been adopted by the church, and whether those individuals who signed a letter revoking the plaintiffs' membership had the authority to do so.

Johnson, 214 N.C. App. at 512, 714 S.E.2d at 811 (discussing the holding of *Tubiolo*, 167 N.C. App. at 329, 605 S.E.2d at 164–65). The present case requires determining which bylaws were in effect, whether new bylaws had been adopted by the Church, whether the Elders had the authority to terminate Davis, and whether the termination was done in accordance with the proper bylaws. “This inquiry can be made without resolving any ecclesiastical or doctrinal matters.” *Tubiolo*, 167 N.C. App. at 329, 605 S.E.2d at 164–65. Our courts have jurisdiction over each of these determinations.

C. Standing

¶ 23 [3] The Church and the Elders argue that Davis does not have standing to bring his claims because they are derivative and brought on behalf of the Church. We disagree.

¶ 24 The Church and the Elders specifically argue that Davis does not have standing to bring a derivative suit on behalf of the Church for his first, second, third, and fifth claims. N.C. Gen. Stat. § 55A-7-40(a) outlines derivative actions, providing:

An action may be brought in a superior court of this State, which shall have exclusive original jurisdiction over actions brought hereunder, in the right of any domestic or foreign corporation by any member or director, provided that, in the case of an action by a member, the plaintiff or plaintiffs shall allege, and it shall appear, that each plaintiff-member was a member at the time of the transaction of which he complains.

N.C. Gen. Stat. § 55A-7-40(a) (2019).

¶ 25 A majority of Davis's first, second, third, and fifth claims allege injuries incurred in his individual capacity, and not on behalf of the Church. However, a portion of Davis's third claim appears to request money damages from the Elders for breach of their fiduciary obligations owed to the Church itself. Seeking remedy on behalf of the Church for harm done to the Church would be a derivative action. The Church and the Elders argue that Davis lacks standing to bring a derivative action as a member of the Church because the First Bylaws explicitly state that the Church has no members. A determination of which bylaws were the

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proper governing authority of the Church at the relevant time is necessary to the determination of whether Davis has standing to bring the derivative action in his third claim.

¶ 26 The remainder of Davis's claims are brought in an individual capacity and are not derivative on behalf of the Church. A plaintiff must show the following three elements in order to establish individual standing:

(1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McDaniel v. Saintsing, 260 N.C. App. 229, 232–33, 817 S.E.2d 912, 914–15 (2018) (citation omitted). The alleged wrongful termination of Davis is an "injury in fact" that satisfies the first element. Davis was terminated by the actions of the Church and the Elders. If the court finds in favor of Davis, the injury will be sufficiently redressed.

¶ 27 The trial court did not err in determining that Davis had standing to bring the claims asserted in his amended counterclaim and third-party complaint at this stage of the proceedings.

D. Motion to Amend

¶ 28 [4] The Church and the Elders assert the trial court erred in granting Davis's motion to amend the counterclaim and third-party complaint under Rule 15 of the North Carolina Rules of Civil Procedure. We review a trial court's decision to grant a motion to amend the pleadings for an abuse of discretion. *Carter v. Rockingham Cnty. Bd. Of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003); *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185–86 (2001) ("A motion to amend the pleadings is addressed to the sound discretion of the trial court."). "[A] trial judge abuses his discretion when he refuses to allow an amendment unless justifying reasoning is shown." *Taylor v. Triangle Porsche–Audi, Inc.*, 27 N.C. App. 711, 714, 220 S.E.2d 806, 809 (1975) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced." *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999) (citation omitted).

¶ 29 The Church has not shown reason justifying a denial of Davis's motion to amend or any materially unfair prejudice as a result of the trial

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court's decision to grant Davis's motion to amend. The trial court did not abuse its discretion by granting Davis's motion to amend the counterclaim and third-party complaint.

III. Conclusion

¶ 30 We hold the trial court did not err in determining it had subject matter jurisdiction over Davis's counterclaims and third-party complaint at this stage of the proceedings. The Church's motion to dismiss for lack of subject matter jurisdiction was properly denied. The trial court did not err in determining Davis had standing to bring the counterclaims and third-party complaint. We hold there was no abuse of discretion in the trial court's decision to grant Davis's motion to amend the counterclaim and third-party complaint. The Order of the trial court is affirmed.

AFFIRMED.

Judge ARWOOD concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

MURPHY, Judge, concurring in part and dissenting in part.

¶ 31 While I concur with the Majority's analysis regarding our jurisdiction over this interlocutory appeal, *supra* at ¶¶ 9-12, I respectfully dissent from its conclusion that we have subject matter jurisdiction over this appeal. *Supra* at ¶¶ 15, 18. I would reverse the trial court's order denying the motion to dismiss for lack of subject matter jurisdiction, which would render the issue regarding Davis's standing moot. I would also hold the trial court lacked subject matter jurisdiction over the complaint, counterclaim, and amended counterclaim and remand for the trial court to dismiss the action with prejudice.¹

ANALYSIS

A. Complete Entanglement of the Original Counterclaim

¶ 32 "Civil court intervention into church property disputes is proper *only when* 'relationships involving church property [have been structured] *so as not to require* the civil courts to resolve ecclesiastical questions.'"

1. For ease of reading, "counterclaim" and "original counterclaim" refer to both the counterclaim and third-party complaint filed 24 October 2019. "Amended counterclaim" refers to the amended counterclaim and third-party complaint filed 30 July 2020.

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Harris v. Matthews, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (emphases added) (marks in original) (quoting *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 665 (1969)); *Western Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (marks omitted) (“The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy.”). Our Supreme Court has defined an ecclesiastical matter as

one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.

Eastern Conference of Original Free Will Baptists of N.C. v. Piner, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966) (quoting *Western Conference of Original Free Will Baptists of N.C. v. Miles*, 259 N.C. 1, 10-11, 129 S.E.2d 600, 606 (1963)), *overruled in part by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973). “When a congregational church’s internal property dispute cannot be resolved using neutral principles of law, the courts must intrude no further[.]” *Harris*, 361 N.C. at 271-72, 643 S.E.2d at 570. Such judicial intrusion would constitute “impermissibl[e] entangle[ment] in the dispute.” *Id.* at 273, 643 S.E.2d at 571.

1. “Spiritual Leader”

¶ 33

Davis’s original counterclaim repeatedly requested judicial recognition that he is “the Bishop, Senior Pastor and *spiritual leader of the Church*.” (Emphasis added). Davis specifically claimed he “is entitled to *judgment declaring* that [he] is the Bishop, Senior Pastor and spiritual leader of the Church[.]” (Emphasis added). The trial court stated it had subject matter jurisdiction over *the original counterclaim* and allowed Davis’s motion to amend. Despite stating in his motion to amend that the purpose was “to amend the factual allegations of the [original counterclaim][,] . . . add a claim for back pay and benefits[,]. . . and . . . add a claim for civil conspiracy[.]” Davis’s amended counterclaim

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also removed the “spiritual leader” language throughout. The amended counterclaim included a request for a “judgment declaring that [Davis] is the Bishop and Senior Pastor of the Church.” Davis’s requests for recognition as the “Bishop” and “Senior Pastor” throughout the amended counterclaim included that language, sans the additional term “spiritual leader.” The removal of the “spiritual leader” language did not fit the stated purpose for amending the counterclaim and suggests an attempt to avoid the prohibition against reviewing purely ecclesiastical issues. Further, the removal of “spiritual leader” underscores the religious nature of the “Bishop” and “Senior Pastor” terms, as well as the similarity and connectedness of all three terms. The original counterclaim required impermissible entanglement in ecclesiastical matters and should have been dismissed for lack of subject matter jurisdiction.

¶ 34 Davis’s request for recognition as the “spiritual leader” of the Church was an explicit request for judicial review of his role within the Church. Davis’s request would require

an examination of the church’s view of the role of the pastor, staff, and church leaders[.] . . . Because a church’s religious doctrine and practice affect its understanding of each of these concepts, seeking a court’s review . . . is no different than asking a court to determine whether a particular church’s grounds for membership are spiritually or doctrinally correct[.] . . . None of these issues can be addressed using neutral principles of law.”

Id. at 273, 643 S.E.2d at 571.

2. Bylaws—“Special Meeting” and “Congregation”

¶ 35 Even assuming, *arguendo*, that a later set of bylaws controls the purported termination of his role as Bishop, Pastor, and spiritual leader of the Church, as Davis claimed, such bylaws would require a special meeting with a specific percentage of congregants to vote for his termination. According to both his original counterclaim and amended counterclaim, “the New Bylaws expressly provide[] that the Bishop of the Church can be dismissed only by a 75% vote of the congregation attending a Special General Meeting called for that purpose. No Special General Meeting of the congregation was convened[.]” What constitutes such a special meeting to dismiss Davis from that role, as well as the definition of congregants or members of the Church, are ecclesiastical matters, which courts may not analyze and where we may not exercise the authority of the State. *See Azige v. Holy Trinity Ethiopian Orthodox Tewahdo*

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Church, 249 N.C. App. 236, 241, 790 S.E.2d 570, 574 (2016) (“Membership in a church is a core ecclesiastical matter. The power to control church membership is ultimately the power to control the church. It is an area where the courts of this State should not become involved. This stricture applies regardless of whether the church is a congregational church, incorporated or unincorporated, or an hierarchical church.”), *disc. rev. denied*, 369 N.C. 532, 797 S.E.2d 290 (2017); *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 493, 598 S.E.2d 667, 671 (2004) (“As the trial court would be required to delve into ‘ecclesiastical matters’ regarding how the church interprets [bylaw requirements such as] types of meetings, the trial court [lacked] subject matter jurisdiction.”).

We are prohibited from becoming entangled in ecclesiastical matters and have no jurisdiction over disputes which require an examination of religious doctrine and practice in order to resolve the matters at issue. . . . Only when an issue to be determined in connection with a party’s claim is a *purely secular* one, then neutral principles of law govern the inquiry and subject matter jurisdiction exists in the trial court over the claim. . . . Therefore, because a church’s religious doctrine and practice affect its understanding of each of the concepts at issue, [the trial court’s involvement] is like asking a court to determine whether a particular church’s grounds for membership are spiritually or doctrinally correct or whether a church’s charitable pursuits accord with the congregation’s beliefs, which are barred.

Lippard v. Holleman, 271 N.C. App. 401, 408, 410-11, 844 S.E.2d 591, 598-99, 600 (citations and marks omitted), *disc. rev. denied, appeal dismissed*, 375 N.C. 492, 847 S.E.2d 882 (2020), *cert. denied*, 594 U.S. ___, 2021 WL 2637859 (2021).

¶ 36

The entirety of the original counterclaim should have been dismissed for lack of subject matter jurisdiction, as it required the trial court to delve into ecclesiastical matters. On appeal, judicial analysis of Davis’s original counterclaim requires impermissible entanglement in this dispute, as no neutral principles of law can be applied to determine whether Davis is the spiritual leader of the Church, whether a special meeting was held to dismiss him from that role, and who constituted a congregant or member of the Church. The Majority’s approach jeopardizes the Church’s “First Amendment values,” as this “church property

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litigation . . . turn[s] on the resolution by civil courts of controversies over *religious doctrine and practice*.” *Harris*, 361 N.C. at 271, 643 S.E.2d at 570 (quoting *Presbyterian*, 393 U.S. at 449, 21 L. Ed. 2d at 665). I would hold the trial court lacked subject matter jurisdiction over Davis’s original counterclaim; we should reverse the order for lack of subject matter jurisdiction and remand to the trial court to dismiss the action with prejudice, rendering the issue regarding Davis’s standing moot. *See id.* at 275, 643 S.E.2d at 572.

B. The Amended Counterclaim

¶ 37

As previously noted, the original counterclaim should have been dismissed as requiring impermissible judicial entanglement in ecclesiastical matters due to Davis’s request for judicial recognition as the spiritual leader of the Church, as well as the requirements under the later set of bylaws. However, even if the original counterclaim was overlooked and the amended counterclaim was the sole focus of our analysis, the amended counterclaim still requires impermissible judicial entanglement in ecclesiastical matters. The following portions of the amended counterclaim, which mirror similar requests and references in the original counterclaim, are ecclesiastical matters requiring impermissible judicial entanglement:

35. [Davis] is entitled to judgment declaring that:

(a) [he] is the Bishop and Senior Pastor of the Church;

...

(d) [and that his] appearances on Church property to conduct church services, minister to the congregation, and otherwise perform his duties as Bishop and Senior Pastor of the Church were and are lawful[.]

....

38. . . . [T]he Third-Party Defendants, purporting to act on behalf of and in the name of the Church, have unlawfully interfered and will continue to interfere with [Davis’s] employment relationship with the Church and with his performance of duties as the Bishop and Senior Pastor of the Church, unless restrained by this Court.

39. [Davis] is entitled to a preliminary and permanent injunction enjoining, restraining and directing plaintiff and the Third-Party Defendants, as follows:

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(a) to allow [Davis] to resume his role and duties as the Bishop and Senior Pastor of the Church, with full compensation and benefits, until such time as the Church's congregation may vote to remove [him] in accordance with the requirements of the New Bylaws of the Church;

(b) to refrain from excluding [Davis] from the Church premises and/or any other Church properties; and

(c) to refrain from taking any action to interfere with, subvert or disrupt [Davis] in the performance of his duties as the Bishop and Senior Pastor of the Church.

. . . .

41. A fiduciary relationship of trust and confidence existed between [Davis], as the Bishop and Senior Pastor of the Church, and the Third-Party Defendants as Elders of the Church.

42. A fiduciary relationship of trust and confidence also existed between the Third-Party Defendants as Elders and the Plaintiff Church they were supposed to serve.

43. Due to the fiduciary relationship that existed between them, the Third-Party Defendants were required in equity and in good conscience to act honestly, in good faith and in the best interests of the Church and [Davis] as the Bishop and Senior Pastor of the Church.

44. . . . [T]he Third-Party Defendants[] have breached their fiduciary duties owed to [Davis] and the Church, in that the Third-Party Defendants have arrogated to themselves the sole management and control of the Church and have prevented [Davis] from exercising his rightful role as the Bishop and Senior Pastor of the Church, all in violation of the requirements of the New Bylaws of the Church.

45. As a direct and proximate result of the Third-Party Defendants' breaches of their fiduciary duties[,] . . . [Davis] has been damaged

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. . . .

49. The Third-Party Defendants intentionally induced the Plaintiff church to breach the employment relationship that existed between the Church and [Davis], and in so doing the Third-Party Defendants acted with malice and without justification.

. . . .

52. . . . [T]he Third-Party Defendants have utilized Church assets to fund this litigation against [Davis].

53. Additionally, the Church maintained a “Key Man” insurance policy issued by New York Life Insurance company on the life of [Davis’s] father [who was] his predecessor as the Bishop and Senior Pastor of the Church, in a benefit amount believed to be several million dollars. Upon information and belief, after [Davis’s] father died in August of 2015, a majority of the benefit amount of that policy was paid to the Church.

54. Because the Third-Party Defendants arrogated to themselves all control and management of the Church’s business affairs and activities, to the exclusion of [Davis] notwithstanding his status and role as the Bishop and Senior Pastor of the Church, [Davis] has been unable to determine how those insurance proceeds have been utilized by the Third-Party Defendants and whether those proceeds have been properly devoted to the Church’s benefit.

55. [Davis], as the Bishop and Senior Pastor of the Church, is entitled to inspect the books and records of the Church, in order to determine how Church assets and funds have been utilized and whether any such assets or funds have been misused or misappropriated by the Third-Party Defendants.

56. [Davis] is entitled to a complete accounting from the Church and the Third-Party Defendants for any and all items of Church property and money diverted, misappropriated, received, used or expended by the Third-Party Defendants, or any of them.

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57. [Davis] is further entitled to have a constructive trust imposed upon the assets of the Third-Party Defendants, for the benefit of the Church, in an amount equal to any Church money or property found by this Court to have been wrongfully misappropriated or taken by the Third-Party Defendants, or any of them.

....

59. The Third-Party Defendants . . . formed an agreement among themselves to do unlawful acts or to do lawful acts in an unlawful way, resulting in injury to the Third-Party Plaintiff, [Davis].

60. After [Davis] discovered the existence of the New Bylaws in November of 2017 and demanded the resignations of the Third-Party Defendants as Elders of the Church, the Third-Party Defendants conspired among themselves to oust [him] and his family members from the Church and thereby arrogate to themselves full control of the Church's operations and activities.

61. Pursuant to their conspiracy, as described above, the Third-Party Defendants committed, or caused to be committed, the following overt acts:

....

(b) In January of 2018, the Third-Party Defendants submitted to [Davis] a purported "evaluation" of his performance. No such "performance evaluation" had ever been previously done on the Bishop and Senior Pastor of the Church, and the Third-Party defendants had no authority under the New Bylaws to conduct such an "evaluation."

(c) Throughout 2018 and the first half of 2019, the Third-Party Defendants refused to meet with [Davis] and instead actively worked to undermine [his] leadership role as the Bishop and Senior Pastor of the Church.

....

WHEREFORE, . . . Davis prays the Court for relief as follows:

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...

3. That the [trial] [c]ourt issue an Order requiring the Church and the Third-Party Defendants to appear and show cause why [his] Motion for Preliminary Injunction should not be granted;

4. That, following a hearing on [Davis's] Motion for Preliminary Injunction, the [trial] [c]ourt issue an Order of Preliminary Injunction directing, enjoining and restraining the Church, the Third-Party Defendants, and all other persons or entities acting at their instruction or in concert with any of them, as follows:

(a) to allow [Davis] to resume his role and duties as the Bishop and Senior Pastor of the Church, with full compensation and benefits, to include back pay from June 2019, pending further Order of the [trial] [c]ourt or until such time as the Church's congregation may vote to remove [Davis] in accordance with the requirements of the New Bylaws of the Church;

(b) to refrain from excluding [Davis] from the Church premises and/or any other Church properties; and

(c) to refrain from taking any action to interfere with, disrupt or subvert [Davis] in the performance of his duties as the Bishop and Senior Pastor of the Church.

5. That, following a trial on the merits, the [trial] [c]ourt enter judgment in favor of [Davis] and against the Church and the Third-Party Defendants on [Davis's] Counterclaim and Third-Party Complaint as follows:

(a) Declaring that [Davis] is the Bishop and Senior Pastor of the Church; that [Davis's] employment relationship with the Church is not an "at-will" employment but instead is an employment relationship governed by the New Bylaws of the Church; that the purported "termination" of [Davis's] employment with the Church, undertaken by the Third-Party Defendants acting on behalf of and in the name of the Church, was contrary to the New Bylaws and therefore unlawful; that [Davis's] appearances on Church property to conduct church services, minister to the

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congregation, and otherwise perform his duties as Bishop and Senior Pastor of the Church were and are lawful; and that [Davis] is entitled to receive back pay and benefits from the Church from the date of the purported termination of his employment with the Church.

(b) Entering an Order of Permanent Injunction, directing, enjoining and restraining the Church, the Third-Party Defendants, and all other persons or entities acting at their instruction or in concert with them, to allow [Davis] to perform his role and duties as the Bishop and Senior Pastor of the Church, with full compensation and benefits, until such time as the Church's congregation may vote to remove [Davis] in accordance with the requirements of the New Bylaws of the Church; to refrain from excluding [Davis] from the Church premises and/or any other Church properties; and to refrain from taking any action to interfere with, disrupt or subvert [Davis] in the performance of his duties as the Bishop and Senior Pastor of the Church.

....

(d) Ordering the Church and the Third-Party Defendants to [p]ermit [Davis] to inspect the books and records of the Church; ordering the Third-Party Defendants to provide a complete accounting for all items of church money or property misappropriated, diverted, received, used or expended by the Third-Party Defendants, or any of them; and imposing a constructive trust upon the assets of the Third-Party Defendants, for the benefit of the Church, in an amount equal to any Church money or property found to have been wrongfully misappropriated or taken by the Third-Party Defendants, or any of them.

1. “Bishop” and “Senior Pastor”

¶ 38

As identified above, Davis still requests a “judgment declaring that [he] is the Bishop and Senior Pastor of the Church” in Paragraph 35(a) of his amended counterclaim, and includes repeated statements that he is “the duly installed Bishop and Senior Pastor of the Church.” These requests and references require a court to determine what constitutes a “bishop” and a “senior pastor,” and how such a leader can be “duly

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installed.” Such a determination would run afoul of our caselaw prohibition against judicial “examination of the church’s view of the role of the pastor, staff, and church leaders[.]” *Harris*, 361 N.C. at 273, 643 S.E.2d at 571. The ecclesiastical nature of Davis’s requests and references is evidenced by his repeated pairing of the positions of “Bishop and Senior Pastor” with “conduct[ing],” “resum[ing],” and “perform[ing] his duties,” as well as “exercising his rightful role” in the Church. For example, Davis asks for a judicial intervention into the purported unlawful interference with his “employment relationship with the Church and with his performance of duties as the Bishop and Senior Pastor of the Church[.]” Courts may not define the role, duties, and services of a church’s leader; but, by affirming its denial of the motion to dismiss, that is exactly what the Majority has allowed the trial court to do. *See id.*; *supra* at ¶¶ 14-15.

2. Fiduciary Relationship

¶ 39 Further, Davis claims that “[a] fiduciary relationship of trust and confidence existed between [him], as the Bishop and Senior Pastor of the Church, and the Third-Party Defendants as the Elders of the Church[.]” and that “the Third-Party Defendants[] . . . breached their fiduciary duties owed to [Davis] and the Church” by “arrogat[ing] to themselves the sole management and control of the Church[.]” Davis’s breach of fiduciary duty claim is similar to the plaintiffs’ allegations in *Harris*. Our Supreme Court has already determined that the ecclesiastical entanglement doctrine prohibits judicial review of whether a church’s internal governing body “breached [its] fiduciary duties by improperly using church funds.” *Harris*, 361 N.C. at 273, 643 S.E.2d at 571. Such a review required an improper “examination of the church’s view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management.” *Id.* We similarly cannot examine the role and relationship between the elders and a pastor, as it involves an improper review of not only roles, duties, and authority, but also church management.

3. Employment Relationship

¶ 40 Davis also claims “[a] valid employment relationship existed between [him and] the Church[,] . . . [and] [t]he Third-Party Defendants intentionally induced the Plaintiff Church to breach the employment relationship that existed between the Church and [Davis], and in so doing the Third-Party Defendants acted with malice and without justification.” “[T]he application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution,” and tortious conduct could be analyzed if neutral laws could be applied. *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 397 (marks omitted), *appeal dismissed*,

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348 N.C. 284, 501 S.E.2d 913 (1998). However, “the decision to hire or discharge a minister is inextricable from religious doctrine and protected by the First Amendment from judicial inquiry.” *Id.* at 495, 495 S.E.2d at 398. Whether the decision to fire Davis was due to failure to perform a religious role or was nefarious would require the examination of religious doctrine, and we cannot allow such an examination.

4. “Church’s Benefit”

¶ 41

In his fifth claim for relief in the amended counterclaim, Davis argues “the Third-Party Defendants have utilized Church assets to fund this litigation against [Davis,]” which entitles Davis “to have a constructive trust imposed upon the assets of the Third-Party Defendants” in the amount of funds “wrongfully misappropriated or taken[.]” According to Davis, he and, by inference, the trial court, must be allowed to inspect Church records to determine whether the portion of a keyman life insurance policy paid to the Church has “been properly devoted to the Church’s benefit.”

Determining whether actions, *including expenditures*, by a church’s [staff and leadership] were proper requires an examination of the church’s view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management. Because a church’s religious doctrine and practice affect its understanding of each of these concepts, seeking a court’s review of the [expenditures] is no different than asking a court to determine whether a particular church’s grounds for membership are spiritually or doctrinally correct or whether a church’s charitable pursuits accord with the congregation’s beliefs. None of these issues can be addressed using neutral principles of law.

Harris, 361 N.C. at 273, 643 S.E.2d at 571 (emphasis added). What constitutes the proper devotion of life insurance proceeds toward the Church’s benefit is an analysis inextricably linked to ecclesiastical issues, and we cannot permit such an analysis.

5. Control of the Church

¶ 42

Davis’s civil conspiracy claim is replete with references to the Third-Party Defendants attempting to “arrogate to themselves full control” of the Church, acting with “no authority,” “actively work[ing] to undermine [Davis’s] leadership role,” and terminating Davis without the

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“75% affirmative vote of the congregation” required under the bylaws. Judicial engagement with claims concerning membership, roles, and duties within the Church requires an analysis we may not conduct. *See id.*; *Emory*, 165 N.C. App. at 492-93, 598 S.E.2d at 670-71.²

6. Injunctive Relief

¶ 43

Finally, Davis’s prayer for relief requests a judicial determination, via injunction, that “allow[s] [Davis] to resume his role and duties as the Bishop and Senior Pastor of the Church” until another court order or congregational removal via “the requirements of the New Bylaws of the Church” takes effect. He also requests a judicial declaration “that [he] is the Bishop and Senior Pastor of the Church[,] . . . that the purported ‘termination’ . . . was contrary to the New Bylaws[,] . . . [and] that [his] . . . perform[ance of] his duties as the Bishop and Senior Pastor of the Church were and are lawful[.]” According to Davis, “the New Bylaws expressly provide[] that the Bishop of the Church can be dismissed only by a 75% vote of the congregation attending a Special General Meeting called for that purpose. No Special General Meeting of the congregation was convened[.]” As previously discussed, the ecclesiastical entanglement doctrine prohibits judicial review of roles within a church, or of what constitutes an appropriate special meeting or membership within a church. *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571; *Emory*, 165 N.C. App. at 492-93, 598 S.E.2d at 670-71. The trial court did not have subject matter jurisdiction over Davis’s request for a positive injunction in his prayer for relief.

7. Conclusion

¶ 44

Even assuming, *arguendo*, we should review the amended counterclaim rather than the original counterclaim, each of Davis’s claims require judicial review of ecclesiastical matters, which runs afoul of the ecclesiastical entanglement doctrine. Davis’s amended counterclaim should have been dismissed for lack of subject matter jurisdiction, and we lack subject matter jurisdiction over the amended counterclaim on appeal. We should remand to the trial court for dismissal of the amended counterclaim, with prejudice. *Harris*, 361 N.C. at 275, 643 S.E.2d at 572.

2. Davis also argues his mother was wrongfully terminated, but he lacks standing to bring such a claim. *See Munger v. State*, 202 N.C. App. 404, 409, 689 S.E.2d 230, 235 (2010) (marks omitted) (“The rationale of the standing rule is that only one . . . personally injured . . . can be trusted to battle the issue.”), *disc. rev. denied*, 365 N.C. 3, 705 S.E.2d 734 (2011).

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C. Lack of Subject Matter Jurisdiction Over Plaintiffs' Complaint

¶ 45 “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. An appellate court has the power to inquire into subject-matter jurisdiction in a case before it at any time, even *sua sponte*.” *Henson v. Henson*, 261 N.C. App. 157, 160, 820 S.E.2d 101, 104 (2018) (citation and marks omitted). The complaint is properly analyzed within this appeal, Davis’s original counterclaim and amended counterclaim included an answer to the complaint, and the Majority does not review whether the trial court had subject matter jurisdiction over the matter from the start. *See Hayes v. Turner*, 98 N.C. App. 451, 454-55, 391 S.E.2d 513, 515 (1990) (“[The plaintiff’s] complaint in summary ejectment alleges that there was no rent and that no lease existed. The record contains neither allegations nor evidence of a landlord-tenant relationship, and [the plaintiff] also failed to allege any of the statutory violations. [The plaintiff’s] amended complaint also fails to assert the required allegations for summary ejectment or for any other cause of action. We therefore, *sua sponte*, conclude that the trial court lacked subject matter jurisdiction to hear the summary ejectment action. We therefore vacate the trial court’s grant of summary judgment for [the] plaintiff on [the] plaintiff’s cause of action and remand for dismissal of that action.”). I would review the complaint to see whether it too runs afoul of the ecclesiastical entanglement doctrine.

¶ 46 The complaint alleges that “[t]he Plaintiff is the owner and lawful possessor of the Premises[.]” “[Davis] continues to attempt to hold unauthorized services and meetings at Plaintiff’s facilities[.]” “[Davis] has disrupted the ongoing legitimate ministries of the Plaintiff and prevented the Plaintiff from carrying on its mission[.]” and “[Davis], by his unauthorized collection and retention of funds and by his failure to return Plaintiff’s property, has committed conversion of Plaintiff’s property.” Much like Davis’s counterclaims, these allegations require improper judicial inquiry into Church governance and membership as it relates to the appropriate leaders and owners of the premises, as well as who has the authority to approve Davis in his attempt to hold services and meetings. *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571; *Emory*, 165 N.C. App. at 492-93, 598 S.E.2d at 670-71. Further, in addition to these allegations, the complaint requires impermissible analysis of what constitutes the legitimate ministry and mission of the Church: “[Davis] has disrupted the ongoing legitimate ministries of the Plaintiff and prevented the Plaintiff from carrying on its mission[.]” *See generally Piner*, 267 N.C. at 77, 147 S.E.2d at 583. Finally, the complaint requests judicial analysis of alleged unauthorized conversion of Church property, which is similar

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to Davis's claims and those of the plaintiffs' improper request in *Harris* for judicial determination of whether expenditures were proper. *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571.

¶ 47 The complaint also requires judicial review of roles within and doctrine of the Church, which runs afoul of the ecclesiastical entanglement doctrine. For this reason, the trial court did not have subject matter jurisdiction over the complaint, and we must remand to the trial court to dismiss it with prejudice along with the original counterclaim and amended counterclaim. *See id.* at 275, 643 S.E.2d at 572.

CONCLUSION

¶ 48 Our courts may not intrude on church disputes that cannot be resolved via only neutral principles of law. Such judicial intrusion constitutes impermissible entanglement in ecclesiastical matters and is prohibited by the First Amendment. The determination of issues from Davis's original counterclaim requires judicial review of ecclesiastical matters. Even if we were to review Davis's amended counterclaim, each claim still requires judicial review of ecclesiastical matters. Finally, the original complaint similarly requires judicial review of ecclesiastical matters. As a result, the trial court lacked subject matter jurisdiction over the entirety of this matter.

¶ 49 While I concur that the Order is properly before us as an interlocutory appeal, I would reverse the trial court's order denying the motion to dismiss for lack of subject matter jurisdiction, rendering the issue regarding Davis's standing moot. I would also hold the trial court lacked subject matter jurisdiction over the complaint, counterclaim, and amended counterclaim and remand for the trial court to dismiss the action with prejudice. For these reasons, I respectfully dissent.

PODREBARAC v. HORACK, TALLEY, PHARR & LOWNDES, P.A.

[279 N.C. App. 624, 2021-NCCOA-529]

DONALD PODREBARAC, PLAINTIFF

v.

HORACK, TALLEY, PHARR & LOWNDES, P.A., AND GENA G. MORRIS, DEFENDANTS

No. COA20-619

Filed 5 October 2021

1. Attorneys—legal malpractice—failure to notarize mediated settlement—enforceability—genuine issue of material fact

In plaintiff's legal malpractice suit filed against his attorneys after his ex-wife successfully challenged a property settlement, the trial court improperly granted summary judgment to the attorneys after determining that their mistakes—after mediation, the attorneys presented stipulations to the trial court that had not been notarized and did not attach a chart of the assets to be distributed—could not have been the proximate cause of any harm to plaintiff. There was a genuine issue of material fact regarding whether the stipulations would have been enforceable if they had been notarized, since they appeared to contain all material and essential terms, making them binding if properly filed.

2. Statutes of Limitation and Repose—legal malpractice—discovery of defect—genuine issue of material fact

In plaintiff's legal malpractice suit filed against his attorneys after his ex-wife successfully challenged a property settlement, the trial court improperly granted summary judgment to the attorneys after determining that the suit was time-barred. There was a genuine issue of material fact regarding when plaintiff reasonably could have discovered his attorneys' mistakes or any resulting consequences. It could be inferred from the evidence that plaintiff could not have discovered the mistakes until after his ex-wife moved to dismiss the domestic action, particularly where his attorneys continued to insist to plaintiff that the agreement was enforceable despite their failure to notarize documents related to the settlement.

Appeal by Plaintiff from an order entered 10 February 2020 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 May 2021.

The Law Offices of James Scott Farrin, by Paul R. Dickinson Jr., Gary W. Jackson, and Christopher R. Bagley, for the Plaintiff-Appellant.

PODBREBARAC v. HORACK, TALLEY, PHARR & LOWNDES, P.A.

[279 N.C. App. 624, 2021-NCCOA-529]

Poyner Spruill LLP, by Cynthia L. Van Horne, for the Defendants-Appellees.

DILLON, Judge.

¶ 1 Plaintiff Donald R. Podrebarac appeals from an order granting summary judgment for Defendants, Horack, Talley, Pharr & Lowndes, P.A., and Gena G. Morris. We vacate and remand.

I. Background

¶ 2 Plaintiff commenced this action claiming Defendants committed legal malpractice in their representation of him in an equitable distribution matter (the “domestic case”) against his ex-wife. During the mediation in the domestic case, Plaintiff and his ex-wife verbally agreed to a distribution of assets. At the conclusion of the mediation, they signed a document (hereinafter the “Stipulations”) that essentially outlined what they had just verbally agreed to. Further, the Stipulations provided that they agreed to *formalize* the terms pertaining to “property settlement and alimony provisions” in a to-be-drafted settlement agreement.

¶ 3 When Defendants presented the Stipulations to the trial court on behalf of their client (Plaintiff) for entry, Defendants mistakenly forgot to attach an accompanying “Asset Chart” *and* failed to have the Stipulations notarized. *See* N.C. Gen. Stat. § 50-20(d) (2009) (requiring that to settle equitable distribution with a stipulation, the stipulation must be notarized). The Asset Chart was significant as it set forth the agreed-upon distribution of all property between the parties.

¶ 4 In any event, a document entitled “Marital Property Settlement Agreement” was circulated amongst the Plaintiff and his ex-wife to formalize their oral agreement, but neither signed the document. Notwithstanding the foregoing, for two years, Plaintiff and his ex-wife acted in lockstep with the terms set forth in this unsigned document.

¶ 5 At some point, though, Plaintiff’s ex-wife began questioning the legitimacy of the Stipulations, triggering Plaintiff to file a Motion for Declaratory Judgment. Plaintiff’s ex-wife responded with a motion to dismiss. The court ruled in her favor, finding the Stipulations to be unenforceable, primarily because they were not notarized.

¶ 6 After continued litigation, Plaintiff and his ex-wife finally settled the dispute, though Plaintiff found the terms less favorable than the terms he thought he and his wife had orally agreed to at their mediation.

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¶ 7 Because of the “unfavorable” settlement in the domestic case, Plaintiff filed this present malpractice action, claiming that Defendants’ failure to properly file the Stipulations caused further litigation with his ex-wife, resulting in additional legal fees and a less favorable result. In response, Defendants filed a motion to dismiss based on the statute of limitations, which the trial court granted. On appeal, in *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 752 S.E.2d 661 (2013), we reversed and remanded. Upon remand, the parties proceeded with discovery, but ultimately, the trial court entered an order granting summary judgment for Defendants. Plaintiff timely appealed.

II. Standard of Review/Legal Malpractice

¶ 8 The standard of review on appeal from a grant of summary judgment is *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). “The party moving for summary judgment is entitled to judgment as a matter of law only when there is no genuine issue of material fact.” *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998).

¶ 9 As for legal malpractice, to prevail against one’s attorney, the client must show “(1) that the attorney breached the duties owed to his client . . . and that this negligence (2) proximately caused (3) damage to the plaintiff.” *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985).

III. Analysis

¶ 10 The trial court entered summary judgment against Plaintiff based on two different theories: (1) the Stipulations do not constitute an enforceable agreement as it was an “agreement to agree,” so Plaintiff could not establish proximate cause of any harm by Defendants’ failures obtaining the trial court’s acceptance of the Stipulations; and (2) Plaintiff’s claim is barred by the statute of limitations. We disagree and conclude that a genuine issue of material fact exists on both issues.

A. Binding Agreement or “Agreement to Agree”

¶ 11 **[1]** The trial court determined the Stipulations to be an “agreement to agree.” As such, the Stipulations, even if properly notarized, would have had no binding effect on Plaintiff and his ex-wife. Therefore, Defendants’ mistakes could not be the *proximate cause* of any harm to Plaintiff.

¶ 12 We conclude, however, that there is at least an issue of fact as to whether the Stipulations with the Asset Chart, if properly notarized, would have been a valid, enforceable agreement for the reasoning below.

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¶ 13 Our Supreme Court has instructed that “[a] contract, or offer to contract, *leaving material portions open for future agreement* is nugatory and void for indefiniteness.” *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (emphasis added) (citations and quotations omitted). The Court explained that:

The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore, [to be itself enforceable] a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.

Id. at 734, 208 S.E.2d at 695.

¶ 14 Further, if the parties to a “preliminary” agreement “manifested an intent not to become bound until the execution of a more formal agreement or document, then such intent would be given effect[,]” even if the preliminary agreement otherwise contained all material terms. *County of Jackson v. Nichols*, 175 N.C. App. 196, 199, 623 S.E.2d 277, 279 (2005).

¶ 15 In any case, our Supreme Court also instructs that “[i]n the usual case, the question whether an agreement is complete or partial is left to inference or further proof.” *Boyce*, 285 N.C. at 734, 208 S.E.2d at 695.

¶ 16 Relying on our Supreme Court’s reasoning in *Boyce*, our Court has held that a contract that the parties expect to formalize is not rendered invalid simply because the parties do not subsequently execute such a formal agreement so long as the parties “assent to the same thing in the same sense, and their minds meet as to all the [material] terms.” *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 493, 606 S.E.2d 173, 177 (2004) (citation and quotation omitted); *see also Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (discussing requirements of (1) a meeting of the minds as to all essential terms; and (2) “sufficiently definite and certain” terms when enforcing preliminary memorandum of settlement).

¶ 17 In the present case, it could be inferred that the Stipulations and Asset Chart, in conjunction, contain all material and essential terms for a binding settlement agreement. And there is otherwise no language therein conclusively expressing an intent that the Stipulations, on their

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own, were *not* binding. The divorcing parties' wishes for alimony, child support, health insurance, life insurance, attorney's fees, taxes, real estate distribution, household goods and furnishings, and property distribution are all included. Thus, when comparing the Stipulations to the unsigned Settlement Agreement, it could be inferred that not one material term goes unaccounted for.

B. Statute of Limitations

¶ 18 **[2]** The trial court also relied on its conclusion that Plaintiff's claims are barred by the applicable statute of limitations. We disagree.

¶ 19 A claim for legal malpractice has a three-year statute of limitations and accrues on the date of the last act of the defendant giving rise to the cause of action. N.C. Gen. Stat. § 1-15(c) (2009). When the statute of limitations has been pleaded as a defense by the defendant, the burden is on the plaintiffs to show that they have timely filed their claim. *Hooper v. Carr Lumber Company*, 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939).

¶ 20 The record shows that Defendants presented the Stipulations to the trial court for entry in the domestic case on 1 May 2009. Plaintiff did not commence this present suit until 14 June 2012, three years *and a month* later. Thus, under the general rule, Plaintiff would be barred by the statute of limitations.

¶ 21 There is, however, an exception to the general rule. The law, often referred to as the "latent discovery proviso," further provides that: (1) if the loss is not readily apparent at the time of its origin and (2) the loss is discovered or should reasonably be discovered by the claimant two or more years after the last act, then [3] suit must be brought within one year from the date the discovery is made. N.C. Gen. Stat. § 1-15(c). "[But] in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action." *Id.* § 1-15(c).

¶ 22 Here, there is some evidence as to the first prong, that the Defendants' errors were not readily apparent to Plaintiff at the time the Stipulations were submitted to the trial court.

¶ 23 Moving to the second prong, it could be inferred from the evidence that Defendants' defective representation was not reasonably discoverable by Plaintiff until on 13 April 2012, when Plaintiff's ex-wife moved for a dismissal in the domestic case. *See Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 75, 752 S.E.2d 661, 664 (2013) (stating that "[t]he earliest that plaintiff could reasonably have been expected to discover that defect was on 13 April 2012, when Ms. Podrebarac's attorney filed a motion to 'dismiss' his motion to enforce

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the ‘mediated settlement agreement’ ”). This date (13 April 2012) occurred two years after the last act (1 May 2009).

¶ 24 Further, it could be inferred from the evidence that Defendants confirmed to Plaintiff, and later redoubled, that the settlement was definite regardless of the error, deterring any assumption of malpractice. *Contra Thorpe v. DeMent*, 69 N.C. App. 355, 317 S.E.2d 692 (1984) (holding that the date of discovery occurred when the defendant-lawyer informed plaintiffs of his error, which effectively destroyed their wrongful death claim, and plaintiffs dismissed lawyer shortly after).

¶ 25 Finally, as the third prong dictates, suit must be brought within a year of discovery. Because it could be inferred that reasonable discovery occurred on 13 April 2012, Plaintiff had until 13 April 2013 (one year later) to file. Plaintiff filed within this window, on 14 June 2012. Accordingly, it could be inferred that Plaintiff timely filed his complaint in this present action.

IV. Conclusion

¶ 26 We hold that a genuine issue of material fact exists as to whether the Stipulations, if properly filed by Defendants, would have been binding. Further, it could be inferred that Plaintiff’s malpractice claim is not time-barred. Accordingly, the trial court erred in granting Defendants’ motion for summary judgment based on these two grounds. We, therefore, vacate the summary judgment order and remand the case for further proceedings.

VACATED AND REMANDED.

Judges CARPENTER and GORE concur.

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[279 N.C. App. 630, 2021-NCCOA-531]

STATE OF NORTH CAROLINA

v.

CARROLL JOSHUA BROWN, DEFENDANT

No. COA20-769

Filed 5 October 2021

1. Probation and Parole—probation revocation—absconding—in-court admission by defendant—waiver of presentation of State’s evidence

The trial court did not abuse its discretion in revoking defendant’s probation where defendant, appearing pro se, repeatedly admitted during the revocation hearing that he had absconded from supervision, and therefore waived the requirement that the State present competent evidence that he violated a condition of his probation.

2. Probation and Parole—probation revocation—judgment form—clerical errors

A judgment revoking defendant’s probation was remanded for the trial court to correct three clerical errors in the judgment form, in which the court mistakenly listed a different crime than the one defendant was convicted of, listed the wrong number of probation violations alleged in the violation report, and inadvertently checked a box indicating that each violation alone could activate defendant’s sentence when, in fact, the court revoked defendant’s probation based solely on his absconding.

Appeal by Defendant from judgment entered 30 May 2019 by Judge Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell, for the State.

Shawn R. Evans for Defendant-Appellant.

INMAN, Judge.

Carroll Joshua Brown (“Defendant”) appeals from the revocation of his probation based on an absconding violation. Defendant contends that the trial court erred in finding he violated his probation because the

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State did not present competent evidence that he had absconded and that the trial court made three clerical errors in its judgment. After careful review, we affirm the trial court's activation of Defendant's sentence, but we remand the case for the trial court to correct the clerical errors.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 Defendant on 15 February 2018 entered an *Alford* plea on a charge of possession with intent to sell and deliver methamphetamine. The trial court sentenced Defendant to 8 to 19 months in prison, suspended for 30 months of supervised probation.

¶ 3 Defendant's first probation officer filed a probation violation report on 1 November 2018, alleging Defendant had failed to attend and comply with cognitive behavioral intervention ("CBI") services, had not paid supervision and court costs, and had been terminated from the Treatment Accountability for Safer Communities ("TASC") program because he did not report. The trial court found Defendant in willful violation of the conditions of his probation and ordered Defendant complete CBI and TASC.

¶ 4 Defendant's case was eventually transferred to another probation officer. His new probation officer could not locate Defendant, so the officer filed a second probation violation report on 9 April 2019. The report alleged five violations:

1. The defendant has failed to report or contact the probation office and has failed to provide his current address, making his whereabouts unknown. The defendant has absconded supervised probation.

The defendant moved from the residence, 3448 East Highway 27 Lincolnton, NC 28092, without permission. The defendant has failed to provide the address to where he is currently residing.

3. The defendant failed to complete CBI as ordered by the court.

4. The defendant is in arrears \$380.00 for probation supervision fees.

5. The defendant is in arrears \$1,782.50 for court cost indebtedness.

6. The defendant has failed to comply with court ordered two drug screens per month.

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Defendant was taken into custody on or about 2 May 2019. After being made aware of the allegations against him, Defendant waived his right to counsel and the matter was scheduled for hearing.

¶ 5 At the probation hearing on 30 May 2019, Defendant, *pro se*, admitted to absconding. Addressing Defendant, the prosecutor asked, “one of the regular conditions of your probation was to not abscond. The allegation is that you failed to report or contact the probation office. And you failed to provide your current address, making your whereabouts unknown. As such, you have violated your supervision. Do you admit that violation?” Defendant responded, “I may have absconded, but I think my current address that I was staying at is in my file. She asked me for that.” The trial court judge clarified, “You are admitting absconding then?” Defendant replied, “Yes, Sir.” Defendant further admitted he had failed to complete CBI and to pay court and supervision costs. The prosecutor then asked, “And then you failed to comply with the court ordered drug screens, two per month; do you admit that?” Defendant answered, “Yes, sir, since I absconded.” When the trial court asked Defendant if he wished to say anything further, Defendant again said, “I absconded.”

¶ 6 The trial court found Defendant had violated the conditions of his probation. Because Defendant absconded pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a), the trial court revoked his probation and activated his sentence of 8 to 19 months with 136 days of jail credit. Defendant filed a handwritten notice of appeal with the clerk on 6 June 2019. On appeal, contemporaneously with his brief, Defendant has filed a petition for writ of certiorari, requesting that we exercise our discretion to review the merits of his appeal in the event his notice is defective.

II. ANALYSIS

1. Appellate Jurisdiction

¶ 7 Defendant’s notice of appeal failed to comply with Rule 4 of our Rules of Appellate Procedure because the notice does not include Defendant’s signature, designate the judgment from which Defendant appealed or the court to which he appealed, or contain a certificate of service.¹ See N.C. R. App. P. 4(b) (2021).

¶ 8 In our discretion and because one of Defendant’s arguments is meritorious, we grant Defendant’s petition for certiorari review. N.C. R. App.

1. In addition, Defendant’s notice of appeal was untimely, though through no fault of his own. Defendant filed his notice of appeal on 6 June 2019, but the trial court did not enter the appellate entries until 28 August 2019, almost two months after the entry of the judgment.

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P. 21(a)(1) (2021) (“The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.”).

2. Competent Evidence to Support Finding of Absconding

¶ 9 **[1]** Defendant argues the trial court erred in finding he violated his probation by absconding because the State failed to present competent evidence.

¶ 10 We review a trial court’s revocation of probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). A trial court abuses its discretion “when a ruling is so manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quotation marks and citation omitted). Probation may be revoked in three circumstances: (1) the trial court has previously ordered two 90-day periods of confinement, (2) the probationer commits a new criminal offense, or (3) the probationer absconded from supervision. N.C. Gen. Stat. § 15A-1344(a)(d2) (2019); N.C. Gen. Stat. §§ 15A-1343(b)(1), (b)(3a) (2019). A probationer absconds by “willfully avoiding supervision” or “making the defendant’s whereabouts unknown to the supervising probation officer.” § 15A-1343(b)(3a).

¶ 11 Defendant’s insistence on appeal that his probation officer had his correct address in her file is not availing. He waived the requirement that the State present evidence and at no time asked to submit sworn testimony. And assuming *arguendo* that Defendant could have offered this factual assertion as testimony and did so, as the trier of fact in a probation violation hearing, the trial court judge is not compelled to accept any testimony as credible. *State v. Robinson*, 248 N.C. 282, 286, 103 S.E.2d 376, 379 (1958) (“In determining whether the evidence warrants the revocation of a suspended sentence, the credibility of the witnesses and the evaluation and weight of their testimony, are for the judge.”) (citations omitted)).

¶ 12 Our caselaw is clear that “a waiver of the presentation of the State’s evidence by an in-court admission of the willful or without lawful excuse violation as contained in the written notice (or report) of violation” satisfies due process requirements at a probation revocation hearing. *State v. Sellers*, 185 N.C. App. 726, 728, 649 S.E.2d 656, 657 (2007) (citing *State v. Williamson*, 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425 (1983)). Put differently, when a defendant admits to willfully violating a condition of his or her probation in court, the State does not need to

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present evidence to support the violations. A probation hearing is not a “formal trial” in North Carolina, so the trial court is not required to “personally examine a defendant regarding his admission that he violated his probation.” *Id.* at 727, 649 S.E.2d at 656 (citing *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967) (“Proceedings to revoke probation are often regarded as informal or summary.”)).

¶ 13 Here, Defendant waived his right to counsel before the hearing. At the hearing, Defendant unequivocally and repeatedly admitted that he had absconded. The trial court asked Defendant directly if he was “admitting absconding;” it was not required to personally examine Defendant further. *Sellers*, 185 N.C. App. at 727, 649 S.E.2d at 656. When Defendant admitted to absconding, he waived the State’s burden of producing competent evidence of the violation.² Defendant cannot now argue that the State failed to meet this burden.

¶ 14 Defendant contends that when he admitted to absconding, he did not understand the legal definition of the word. We reject this argument.

¶ 15 Defendant relies on *State v. Crompton*, 270 N.C. App. 439, 842 S.E.2d 106 (2020), to his detriment. First, *Crompton* held that allegations in a probation violation report tracking the language of Sections 15A-1343(b)(2) and (3) may be sufficient to allege an absconding violation under Section 15A-1343(b)(3a). 270 N.C. App. at 442-49, 842 S.E.2d at 110-14. Defendant does not contend the allegations in the probation violation report were insufficient. *See* N.C. R. App. P. 28(a) (2021) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”). Second, in *Crompton* the probationer admitted to the underlying factual allegations in the probation violation report. 270 N.C. App. at 441, 842 S.E.2d at 109. Here, Defendant admitted to the violation of willfully absconding throughout the course of the probation hearing. Finally, *Crompton* did not cite or rely upon *Sellers*, which is controlling in this case.

2. North Carolina Department of Public Safety Community Corrections’ policies and procedures require probation officers to take the following investigative actions before declaring a probationer an absconder: (1) review AOC alerts; (2) attempt to call the offender via telephone; (3) conduct, at a minimum, two home contacts on separate days and leave written reporting instructions; (4) attempt to contact the offender at school or work; (5) contact a relative or reference; (6) contact treatment providers; and (7) contact local law enforcement. N.C. Dep’t Pub. Safety Cmty. Corr., Policy & Procedures, *Absconder Investigation* § D.0503, 275-76 (April 2019), <https://www.ncdps.gov/document/community-corrections-policy-manual>. Because Defendant admitted that he had absconded at the revocation hearing, the trial court did not need to consider what investigative steps the probation officer took to locate him.

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¶ 16 We affirm the trial court's finding that Defendant absconded in violation of his probation, based on Defendant's own admissions and the allegations in the probation violation report.

3. Clerical Errors in the Judgment

¶ 17 **[2]** Defendant requests we remand this case to the trial court to correct clerical errors in the judgment. The State concedes error, and we agree.

¶ 18 When the trial court's written judgment contradicts its findings in open court, we will remand the judgment to correct the clerical error, *State v. Newsome*, 264 N.C. App. 659, 665, 828 S.E.2d 495, 500 (2019) (citations omitted), "because of the importance that the record speak the truth," *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quotation marks and citations omitted).

¶ 19 Defendant alleges three clerical errors in the judgment. First, the record reveals Defendant was convicted of possession with intent to sell and deliver methamphetamine. However, the judgment form incorrectly lists Defendant's conviction as possession with intent to manufacture, sell, or deliver marijuana. Second, while the violation report only alleges five violations, paragraphs 1, 3, 4, 5, and 6, the judgment inadvertently denotes six different violations—1, 2, 3, 4, 5, and 6. Third, the trial court mistakenly checked a box on the judgment form to indicate that each violation alone could activate Defendant's sentence. It is clear from the transcript of the probation violation hearing that the trial court revoked Defendant's probation based only on the absconding violation in accordance with our statutes and caselaw. N.C. Gen. Stat. § 15A-1344(d2); §§ 15A-1343(b)(1), (b)(3a); *Newsome*, 264 N.C. App. at 665, 828 S.E.2d at 500.

¶ 20 Accordingly, we remand so the judgment may reflect the appropriate conviction, number of probation violations, and revocation of Defendant's probation based on his absconding. *See Newsome*, 264 N.C. App. at 665, 828 S.E.2d at 500 (remanding so the judgment may "clearly indicate that probation was revoked because Defendant had committed a criminal offense or absconded").

III. CONCLUSION

¶ 21 For the reasons explained above, we affirm the activation of Defendant's sentence. However, we remand to the trial court to correct the described clerical errors in the judgment.

AFFIRMED IN PART; REMANDED IN PART.

Judges WOOD and JACKSON concur.

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[279 N.C. App. 636, 2021-NCCOA-532]

STATE OF NORTH CAROLINA

v.

JAMES CHRISTOPHER BUNTING, DEFENDANT

No. COA20-643

Filed 5 October 2021

**Sentencing—prior record level—calculation—unclear from record
—stipulation invalid**

Defendant was entitled to a new sentencing hearing because his stipulation to a prior record level worksheet that listed eighteen convictions was invalid where the record was indeterminate regarding which convictions were used to assign twelve points (making defendant a prior record level IV offender for sentencing purposes). The worksheet included several crossed-out and hand-written items, making it unclear whether the trial court improperly included convictions used as a predicate to establish defendant's status as a habitual felon. Further, if any of the out-of-state convictions were used, defendant's stipulation was inadequate to establish that they were substantially similar to North Carolina offenses, which involved a question of law to be proved by the State.

Appeal by defendant from judgment entered 10 January 2020 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary L. Maloney, for the State.

Kimberly P. Hoppin for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 James Christopher Bunting (“Defendant”) appeals from judgment after a jury convicted him of one count of felony sale or delivery of heroin, one count of felony sale or delivery of heroin within 1,000 feet of a school, and one count of felony possession with intent to sell or deliver heroin, and after Defendant plead guilty to habitual felon status pursuant to a plea agreement. On appeal, Defendant argues the trial court erred in sentencing him as a prior record level IV offender because it was unclear from the record and prior record level worksheet whether the felony convictions used to establish his habitual felon status were improperly

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included in the trial court's calculation of his prior conviction points and prior record level, to which Defendant stipulated. Furthermore, Defendant contends the State failed to meet its burden of proving his out-of-state offenses were felonies in the respective states of origin, or that they were substantially similar to felonies in North Carolina. After careful review, we remand for a new sentencing hearing because the terms of the stipulation fail to definitively identify which convictions the trial court used to calculate Defendant's prior record level.

I. Factual & Procedural Background

¶ 2 On 27 June 2018, Defendant was arrested and charged with the following offenses: (1) sale and delivery of a Schedule I controlled substance, in violation of N.C. Gen. Stat. § 90-95(a)(1); (2) the manufacture, sale, and delivery, or possession of a controlled substance within 1,000 feet of a school, in violation of N.C. Gen. Stat. § 90-95(e)(8); and (3) possession with intent to sell or deliver a Schedule I controlled substance, in violation of N.C. Gen. Stat. § 90-95(a)(1). On 29 October 2018, a New Hanover County grand jury returned a true bill of indictment for the three drug-related offenses under case file number 18 CRS 55008. On the same day, Defendant was charged in a true bill of indictment with obtaining the status of habitual felon in violation of N.C. Gen. Stat. 14-7.1 under case file number 18 CRS 5278. This true bill of indictment alleged Defendant was previously convicted of at least three successive felonies including possession with the intent to sell or distribute cocaine on 18 May 2001, possession of cocaine on 12 January 2006, and possession of marijuana on 28 October 2013.

¶ 3 On 10 January 2020, Defendant was tried by jury and was unanimously convicted of the three felony drug charges. Defendant then entered into a plea agreement in which Defendant agreed to plead guilty to his status as an habitual felon. Defense counsel and the prosecutor signed, and Defendant stipulated to, a prior record level worksheet prepared by the State listing eighteen total convictions. Of the eighteen total prior convictions, four convictions relate to or establish Defendant's habitual felon status, five are out-of-state convictions, two are class A1 or 1 misdemeanor convictions eligible for calculating Defendant's prior record level, two are Class H or I North Carolina felonies eligible for purposes of counting towards Defendant's prior record level, and five are North Carolina misdemeanor convictions not eligible for purposes of counting towards Defendant's prior record level. Four of the five total out-of-state convictions were crossed through by hand. Under Section V of the worksheet, an aggregate of 18 points was handwritten beside ten of the eighteen prior convictions. Of the convictions assigned points,

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three are out-of-state convictions, two are misdemeanor convictions, two are North Carolina felony convictions, and three are felony convictions used to establish Defendant's status as an habitual felon. All but one of the three out-of-state convictions assigned points were crossed out. Defendant's prior felony Class H and I convictions under Section I of the worksheet were initially assigned 14 points—this number was crossed out by hand and changed to 10 points without explanation. Defendant's prior Class A1 or 1 misdemeanor convictions were assigned 2 points. Thus, Defendant was assigned a total of 12 prior record level points on the worksheet, which classified Defendant as a prior record level IV offender for sentencing purposes.

¶ 4 Defendant again stipulated during an exchange between the trial court, the prosecutor, and Defendant's counsel to the calculation of points and his status as a prior record level IV offender. Following this colloquy, the State summarized the evidence it would have presented had the case proceeded to trial, and Defendant did not object to the State's factual basis for finding habitual felon status. The State stipulated to certain mitigating factors presented by defense counsel, including Defendant's voluntary acknowledgment of wrongdoing at an early stage of the criminal process, Defendant's support system in the community, Defendant's support to his family, and Defendant's gainful employment. The trial court accepted the mitigating factors proffered by Defendant, consolidated Defendant's convictions for judgment, and entered judgment. It arrested judgment on the charge of manufacture, sale, and delivery, or possession of a controlled substance within 1,000 feet of a school. After calculating Defendant's prior record level at IV based on 12 prior record points, and finding mitigating factors outweighed aggravating factors, the trial court judge sentenced Defendant to a minimum term of 80 months and a maximum term of 108 months of imprisonment in the custody of the North Carolina Department of Correction. Defendant gave notice of appeal in open court.

II. Jurisdiction

¶ 5 This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444 (2019).

III. Issue

¶ 6 The issues presented on appeal are whether: (1) there is competent evidence in the record to support Defendant's prior record level IV where he stipulated to his prior conviction points and prior record level; (2) Defendant received ineffective assistance of counsel to the extent he

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stipulated to his out-of-state convictions; and (3) the trial court committed prejudicial error in calculating Defendant's prior record level points.

IV. Prior Record Level Calculation

¶ 7 As an initial matter, we address the State's contention that Defendant's stipulation as to his prior record level "negate[d] the basis for appeal." We disagree and note Defendant has a direct right of appeal from the trial court's alleged miscalculation of his prior record level pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1) (2019).

¶ 8 Next, Defendant contends the trial court committed reversible error in calculating he had 12 prior conviction points and sentencing him as a prior record level IV. The State maintains Defendant's appeal seeking assignment of error on the calculation of the prior record level worksheet is without merit and should be denied because Defendant stipulated to his prior convictions. For the reasons set forth below, we conclude Defendant's stipulation to his prior conviction points and prior record level was invalid.

A. Standard of Review

¶ 9 "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)). Therefore, we consider "whether the competent evidence in the record adequately supports the trial court's [determination]" of Defendant's prior record level. *Id.* at 633, 681 S.E.2d at 804.

B. Analysis

¶ 10 The Structured Sentencing Act of North Carolina provides that "the [trial] court shall determine the prior record level for the offender pursuant to [N.C. Gen. Stat. §] 15A-1340.14" before imposing a sentence on the defendant. N.C. Gen. Stat. § 15A-1340.13 (2019). "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or . . . the jury, finds to have been proved in accordance with . . . section [15A-1340.14(a)]." N.C. Gen. Stat. § 15A-1340.14(a) (2019). Class A1 and Class 1 prior misdemeanor convictions are assigned 1 point each. N.C. Gen. Stat. § 15A-1340.14(a)(5). Class H or I felony convictions are assigned 2 points each. N.C. Gen. Stat. § 15A-1340.14(a)(4). "In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." N.C. Gen. Stat. § 14-7.6 (2019).

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¶ 11 “The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.” N.C. Gen. Stat. § 15A-1340.14(f)(4) (2019). “Stipulation of the parties” is one method by which a prior conviction may be proved. N.C. Gen. Stat. § 15A-1340.14(f)(1) (2019). As our Supreme Court has stated, the “terms [of a stipulation] must be definite and certain in order to afford a basis for judicial decision” *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961), *superseded by statute on other grounds*, N.C. Gen. Stat. § 20-179(a) (2003) (citation omitted). “[P]roof by stipulation necessarily includes the factual basis and legal application to the facts underlying the conviction. Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense.” *State v. Arrington*, 371 N.C. 518, 524, 819 S.E.2d 329, 333 (2018).

¶ 12 Here, Defendant does not challenge the 2 prior record level points assessed for two misdemeanor convictions but maintains the record is unclear as to which five felony convictions listed on the prior record level worksheet were counted for purposes of determining his prior felony conviction points totaled 10, and his prior record level is IV. He asserts the trial court was prohibited from including the three predicate felony convictions that establish his habitual felon status in the indictment. The State argues that even if the convictions that are crossed out are not counted, there are 14 remaining points that can be counted towards Defendant’s prior record level. Additionally, the State maintains that since Defendant and the State stipulated to the worksheet, Defendant’s prior record level was agreed upon by the parties, and therefore, the State met its burden of proving Defendant’s prior record level by the preponderance of the evidence.

¶ 13 We disagree with the State’s assessment. In this case, 6 of the 14 remaining points—after the crossed-out convictions are excluded—are attributable to the three felony convictions that were used as a predicate for Defendant’s status of habitual felon, and therefore, cannot be used in determining Defendant’s prior record level. *See* N.C. Gen. Stat. § 14-7.6. However, we are unable to discern from the record whether the trial court did in fact apply the three predicate felony convictions used to establish Defendant’s habitual status in its prior record level calculation or whether the trial court used all or some of the out-of-state convictions in calculating Defendant’s prior record level.

¶ 14 The State relies on *State v. Arrington* in its assertion that the State met its burden of proof as to Defendant’s prior conviction points and

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prior record level because both parties agreed to the stipulation. *See* 371 N.C. at 524–25, 819 S.E.2d at 333. We find *State v. Arrington* readily distinguishable from the case *sub judice*. In *Arrington*, the felonies used to calculate the defendant’s prior record level were not unclear or indeterminate from the record. Rather, in that case, our Supreme Court considered a defendant’s appeal of right after the Court of Appeals held the defendant’s stipulation as to the type of North Carolina second-degree murder conviction, following the state legislature’s division of the offense into two classifications, “was an improper legal stipulation.” *Id.* at 519, 521, 819 S.E.2d at 330–31. The Court reversed the Court of Appeals’ decision and held the classification of the offense was a question of fact; thus, the defendant properly stipulated to the question of fact regarding the conviction classification as well as his prior record level points. *Id.* at 527, 819 S.E.2d at 335.

¶ 15 In the instant case, the trial court had to have either included one or more of Defendant’s out-of-state convictions or one or more of Defendant’s prior felonies used to establish his habitual felon status in order to reach 12 points in calculating Defendant’s prior conviction points. If the out-of-state convictions were used, then the State failed to prove by the preponderance of the evidence that Defendant’s strangulation in the second-degree conviction was substantially similar to a particular North Carolina felony. *See Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (“[T]he trial court may not accept a stipulation to the effect that a particular out-of-state conviction is ‘substantially similar’ to a particular North Carolina felony or misdemeanor.”). Unlike *Arrington*, in which the defendant properly stipulated to a question of fact, in this case, Defendant could not have properly stipulated to a question of law nor could he have properly stipulated to a prior conviction level calculation that included the felonies used as a predicate for establishing his status as an habitual felon. *See State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006), *disc. rev. denied*, 362 N.C. 477, 666 S.E.2d 766 (2008) (“[T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court.”); *State v. Chappelle*, 193 N.C. App. 313, 333, 667 S.E.2d 327, 339 (2008) (“[A] stipulation regarding out-of-state convictions is insufficient, absent a determination of substantial similarity by the trial court, to support the trial court’s prior record determination.”); N.C. Gen. Stat. § 15A-1340.14(e) (establishing the default classification for out-of-state felony convictions is “Class I”); N.C. Gen. Stat. § 14-7.6.

¶ 16 We hold the signed prior record level worksheet was not sufficiently “definite and certain” to constitute a valid stipulation by Defendant. *See*

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Powell, 254 N.C. at 234, 118 S.E.2d at 619. The matter must be remanded to the trial court for re-sentencing.

¶ 17 To avoid errors on remand, the State must meet its burden of proof with respect to proving Defendant's out-of-state convictions. *See* N.C. Gen. Stat. § 15A-1340.14(e) (2019). Although Defendant can properly stipulate to the existence of offenses and whether the offenses are felonies or misdemeanors, Defendant cannot stipulate that an out-of-state conviction is substantially similar to a North Carolina offense. *See Bohler*, 198 N.C. App. at 637–38, 681 S.E.2d at 806; *State v. Burgess*, 216 N.C. App. 54, 58–59, 715 S.E.2d 867, 871 (2011). We note Defendant's prior record level worksheet is evidence of his binding stipulation as to the existence of the out-of-state convictions and as to the fact the offenses were felonies under the law of the states where the offenses originated. *See Bohler*, 198 N.C. App. at 637–38, 681 S.E.2d at 806.

¶ 18 Because we remand the case for a new sentencing hearing, we need not consider whether Defendant received ineffective assistance of counsel with respect to his stipulations to out-of-court convictions or whether the trial court committed prejudicial error by miscalculating Defendant's prior record level.

V. Conclusion

¶ 19 We hold Defendant's stipulation as to his prior felony convictions is not sufficiently definite because we cannot reasonably determine whether his prior felonies, which predicated his habitual felon status, were improperly used by the trial court in calculating Defendant's prior record level. We remand the matter to the trial court for a re-sentencing hearing.

REMANDED FOR RE-SENTENCING.

Judges DILLON and INMAN concur.

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[279 N.C. App. 643, 2021-NCCOA-533]

STATE OF NORTH CAROLINA

v.

KENNETH ANTON ROBINSON

No. COA20-763

Filed 5 October 2021

1. Appeal and Error—denial of motion to suppress—failure to preserve right to appeal—by no fault of defendant

After pleading guilty to charges of drug trafficking and possession of a firearm by a felon, defendant failed to preserve his appeal from the denial of his motion to suppress where the plea transcript did not include a statement by defendant reserving the right to appeal the trial court's judgment. However, because defendant had lost his right to appeal through no fault of his own but rather due to his trial counsel's failure to give proper notice of appeal, defendant's appeal was reviewed by certiorari.

2. Criminal Law—denial of motion to suppress—Anders review—no issues of arguable merit

After defendant pleaded guilty to charges of drug trafficking and possession of a firearm by a felon, the trial court's judgment was upheld on appeal where defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), raising four legal issues that, ultimately, lacked arguable merit. Specifically, the indictments against defendant were sufficient to confer jurisdiction upon the trial court; the trial court properly denied defendant's motion to suppress evidence from law enforcement's search of his home because competent evidence showed that the officers did not act in bad faith by turning off their body-worn cameras and that no exculpatory evidence was lost; a sufficient factual basis existed for defendant's guilty plea; and the trial court properly sentenced defendant within the statutory guidelines.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 11 July 2019 by Judge Gregory R. Hayes in Guilford County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Rivera, for the State.

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Richard J. Costanza for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Kenneth Anton Robinson (“defendant”) appeals from judgment entered upon defendant’s guilty plea to trafficking in opium by possession and possession of a firearm by a felon. We dismiss defendant’s appeal and by *writ of certiorari* find no error.

I. Background

¶ 2 On 6 February 2017, a Guilford County grand jury indicted defendant on charges of trafficking in opium by possession and possession of a firearm by a felon. Defendant was indicted with an additional charge of trafficking in opium by possession on 7 May 2018.

¶ 3 The trial court heard defendant’s motion to suppress at a hearing on 8 July 2019. At the hearing, the trial court heard testimony that law enforcement officers with the Greensboro Police Department executed a search warrant at defendant’s residence on 16 December 2016. The law enforcement officers were equipped with body-worn cameras and had the cameras activated prior to entering the residence. During the initial entry of the residence, a law enforcement officer conducted a walk-through of the property with their body-worn camera activated. After the walk-through, the supervising officer directed the other officers to turn off their body-worn cameras.

¶ 4 The State introduced a copy of the Greensboro Police Department’s departmental directives regarding body-worn cameras. The directive requires body-worn cameras to be used during the execution of search warrants, but also allows officers to turn off their cameras if directed to do so by a supervising officer.

¶ 5 The trial court denied the motion to suppress by order entered 10 July 2019. In doing so, the trial court found that turning off the body-worn cameras was not done in bad faith and that no materially exculpatory evidence was lost; only potentially useful evidence was lost.

¶ 6 On 9 July 2019, defendant entered guilty pleas to two charges of trafficking in opium by possession and one charge of possession of a firearm by a felon. In the factual basis, the State noted that defendant was present at the search at issue in the motion to suppress as well as a later search on 7 February 2018. During the sentencing hearing, the trial court declined defendant’s invitation to make a substantial assistance deviation from the mandatory minimum sentence but did note defendant’s

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assistance following his 16 December 2016 arrest. The trial court consolidated the charges into a single judgment and imposed an active sentence of 90 to 120 months in prison.

¶ 7 Defendant filed written notice of appeal 17 July 2019. Defendant additionally filed a petition for *writ of certiorari* on 29 December 2020.

II. Discussion

A. Appellate Jurisdiction

¶ 8 [1] Under N.C. Gen. Stat. § 15A-979, a defendant entering notice of appeal following the denial of a motion to suppress is required to either include in the plea transcript a statement reserving the right to appeal the trial court's judgment, or to orally advise the trial court and prosecutor before the conclusion of plea negotiations that the defendant intended to appeal the trial court's judgment. *See State v. Brown*, 217 N.C. App. 566, 569, 720 S.E.2d 446, 449 (2011). Because the plea transcript is silent as to defendant's intent to appeal the trial court's judgment, defendant has failed to preserve his appeal. Defendant's appellate counsel has filed a petition for *writ of certiorari* requesting appellate review of the trial court's judgment under Rule 21 of the North Carolina Rules of Appellate Procedure.

¶ 9 Rule 21 provides that "writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21. This Court has previously granted petitions for *writ of certiorari* where, as here, "[d]efendant lost [their] right to appeal through no fault of [their] own but rather due to [their] trial counsel's failure to give proper notice of appeal." *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 232 (2015). In such circumstances, the defendant's appeal is dismissed and this Court issues *writ of certiorari* to address the merits of the defendant's argument. *Id.* (citing *In re I.T.P.-L.*, 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008)). Because defendant has lost the right to appeal without fault, we dismiss his appeal and exercise our discretion to grant defendant's petition for *writ of certiorari* and address the merits of defendant's appeal.

B. *Anders* Brief

¶ 10 [2] Defendant's appellate counsel could not "identify any meritorious issues that could support a meaningful argument for relief on appeal[.]" and requests this Court review the record on appeal for any issues of merit, pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). In order

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to comply with *Anders*, appellate counsel was required to file a brief referring any arguable assignments of error, as well as provide defendant with copies of the brief, record, transcript, and the State's brief. *Kinch*, 314 N.C. at 102, 331 S.E.2d at 666-67. Defendant's counsel has done so and accordingly has fully complied with *Anders* and *Kinch*. Defendant did not file a *pro se* brief with this Court.

¶ 11 Pursuant to *Anders*, this Court must conduct "a full examination of all the proceedings[,] including a "review [of] the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous." *Kinch*, 314 N.C. at 102-103, 331 S.E.2d at 667 (citation omitted). Defendant's appellate counsel submitted the following legal points: (1) whether the indictments were sufficient to confer jurisdiction upon the trial court; (2) whether the trial court erred in denying the motion to suppress; (3) whether there was a sufficient factual basis for the plea; and (4) whether the trial court erred in sentencing defendant. We agree with defendant's appellate counsel that it is frivolous to argue these issues.

¶ 12 In this case, the indictments against defendant were legally sufficient and conferred jurisdiction upon the trial court, as they gave defendant sufficient notice of the charges against him. *See State v. Harris*, 219 N.C. App. 590, 592-93, 724 S.E.2d 633, 636 (2012).

¶ 13 There was competent evidence to support the trial court's denial of defendant's motion to suppress. The circumstances of the search reflect that defendant was aware of and cooperating in the search and was on notice of the execution of the warrant. The video evidence of the warrant execution also shows that the law enforcement officers announced their presence before entering the residence, with defendant standing nearby. Furthermore, the officers executing the search complied with departmental guidelines and directives in turning off their body-worn cameras. The trial court properly found that the law enforcement officers did not act in bad faith by turning off their body-worn cameras and that only potentially useful evidence was lost.

¶ 14 The transcript reflects the factual basis for the plea was sufficient for each charge in the judgment. The factual basis included a thorough recitation of the evidence presented at the suppression hearing and addressed all charges to which defendant pleaded guilty.

¶ 15 Finally, the trial court did not err in sentencing defendant to the mandatory minimum sentence pursuant to the structured sentencing chart. Although defendant's trial counsel argued that defendant's sentence

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should be mitigated due to substantial assistance, the trial court chose to credit defendant with substantial assistance by consolidating the charges for the 7 February 2018 event into one offense. The trial court did not err in concluding that defendant's efforts did not rise to the level of substantial assistance to be applied to multiple offenses.

¶ 16 Apart from the potential issues provided by defendant's appellate counsel, our review of the record has revealed no other arguable issues. Accordingly, we hold the trial court did not err in denying defendant's motion to suppress and in sentencing defendant along statutory guidelines.

III. Conclusion

¶ 17 For the foregoing reasons, we dismiss defendant's appeal, grant defendant's petition for *writ of certiorari*, and find no error.

DISMISSED, NO ERROR.

Judge GRIFFIN concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

¶ 18 When we conduct an *Anders* review of the Record and identify an issue of arguable merit, we may remand for the appointment of new appellate counsel to provide briefing on that issue. Here, Defendant's appellate counsel was unable to identify any issues of potential merit for appeal and requested that we examine the Record in accordance with *Anders*. After conducting such an examination of the Record, I have identified multiple issues of arguable merit—the application of Defendant's substantial assistance to sentence mitigation under N.C.G.S. § 90-95(h)(5), and whether law enforcement's execution of the search warrant violated the notice requirements of N.C.G.S. § 15A-249. Accordingly, I would remand for the appointment of new appellate counsel to provide briefing on these, and any other, issues of potential merit.

BACKGROUND

¶ 19 The Greensboro Police Department arrested Defendant Kenneth Anton Robinson for trafficking "opium or heroin" by possession and possession of a firearm by a felon on 16 December 2016. Defendant was indicted for these charges on 6 February 2017. After his release from custody, Defendant was also arrested for a second charge of trafficking

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“opium or heroin” by possession on 7 February 2018. Defendant was indicted for the second charge on 7 May 2018.

¶ 20 Defendant moved to suppress evidence related to the 16 December 2016 offenses that the Greensboro Police Department obtained via execution of a search warrant on that date. The trial court held a suppression hearing on 8 July 2019 and denied Defendant’s motion to suppress. Without retaining his right to challenge the order denying his motion to suppress, Defendant subsequently pled guilty to all three charges on 9 July 2019. The trial court consolidated the convictions into one judgment, the Class E felony of trafficking in opium by possession for the 7 February 2018 charge. Defendant received an active sentence of 90 to 120 months in accordance with the mandatory minimum sentence of N.C.G.S. § 90-95(h)(4).

¶ 21 Defendant filed a *Notice of Appeal* on 17 July 2019, but in his *Petition for Writ of Certiorari*, Defendant’s appellate counsel concedes

Defendant (and his trial counsel) failed to preserve [] Defendant’s right to appeal. Specifically, [] Defendant did not comply with [N.C.G.S.] § 15A-979[,]
... [which] requires a defendant entering notice of appeal following the denial of a motion to suppress to (1) include in the plea transcript a statement reserving the right to appeal the trial court’s judgment, or (2) to orally advise the trial court and prosecutor before plea negotiations have ended that [] Defendant intends to appeal the judgment.

Defendant’s appellate counsel petitioned this Court on 29 December 2020 to issue a writ of certiorari for the review of the 9 July 2019 judgment.

¶ 22 In his no-merit brief on appeal pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh’g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), Defendant’s appellate counsel stated he had

examined the trial court record and relevant cases and statutes and is unable to identify any meritorious issues that could support a meaningful argument for relief on appeal. As such, appellate counsel respectfully asks the Court to examine the [R]ecord on appeal for possible prejudicial error and to determine whether counsel overlooked any meritorious issues.

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In response, the State moved to dismiss Defendant's appeal. According to the State, "no reversible error appears on the face of the [R]ecord[.]" and it argues we should deny Defendant's *Petition for Writ of Certiorari*. I disagree with Defendant's appellate counsel's review of the Record, as well as the Majority's analysis of the issues of arguable merit, and would withhold my decision on the bulk of Defendant's *Petition for Writ of Certiorari*.

ANALYSIS

¶ 23 In accordance with *Anders*, we fully examine the Record to identify any issues of arguable merit. *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498 (holding that if a court "finds any of the legal points arguable on their merits (and therefore not frivolous) [in a case in which an *Anders* brief was filed] it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal"). With respect to *Anders* briefs, North Carolina defines a frivolous appeal as "[o]ne in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." *Kinch*, 314 N.C. at 102 n.1, 331 S.E.2d at 667 n.1 (1985) (citing *Frivolous Appeal*, Black's Law Dictionary (5th ed. 1979)).

¶ 24 While the Majority relies on the proper standard for *Anders*, it fails to properly apply it. *Supra* at ¶¶ 10-16. The blanket assertions that the trial court did not err in its analysis of the search warrant execution and application of substantial assistance to mitigate sentencing do not obviate the need for further briefing under *Anders*. *Supra* at ¶¶ 13, 15.

A. Possible Meritorious Issues on Appeal**1. Sentencing**

¶ 25 In my examination of the Record, I have identified the following issue of arguable merit: whether the trial court abused its discretion by applying Defendant's "substantial assistance" to only one case under N.C.G.S. § 90-95(h)(5) in light of *State v. Baldwin*. *State v. Baldwin*, 66 N.C. App. 156, 158, 310 S.E.2d 780, 781, *aff'd per curiam*, 310 N.C. 623, 313 S.E.2d 159 (1984); N.C.G.S. § 90-95(h)(5) (2019).

¶ 26 N.C.G.S. § 90-95(h) governs controlled substance trafficking charges, including the mandatory sentencing range for violations of the statute. N.C.G.S. § 90-95(h) (2019). N.C.G.S. § 90-95(h)(5) provides the following regarding mitigation of sentences for violations of the statute:

Except as provided in this subdivision, a person being sentenced under this subsection may not receive a

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suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

N.C.G.S. § 90-95(h)(5) (2019).

¶ 27 In *Baldwin*, we established that a trial court may apply “substantial assistance” in other cases to mitigate sentencing for the case being heard. *Baldwin*, 66 N.C. App. at 158, 310 S.E.2d at 781. We stated:

It is clear from the trial court’s comments during the sentencing hearing and its finding of fact number 4 that the [trial] court read [N.C.G.S. § 90-95(h)] to limit its consideration of [the] defendant’s “substantial assistance” to assistance in the case being heard. [The] [d]efendant argues that the “accomplices, accessories, co-conspirators, or principals” need not be involved in the case for which the defendant is being sentenced, and that [N.C.G.S.] § 90-95(h)(5) therefore permits the trial court to consider [the] defendant’s “substantial assistance” in other cases. We agree.

Id. I note the relevant statutory section effective at the time the offense was committed in *Baldwin* was not substantially different in any way from the current relevant statutory section quoted above. Compare N.C.G.S. § 90-95 (1981), with N.C.G.S. § 90-95 (2019).

¶ 28 Here, my review of the transcript reveals the trial court may have improperly applied N.C.G.S. § 90-95(h)(5), as the trial court may have believed it could only apply substantial assistance to mitigate sentencing regarding cases on one date, based on the trial court’s following statement:

There’s no doubt in the [trial] [c]ourt’s mind and based on everybody’s testimony that [Defendant] deserves credit for substantial – [Defendant] deserves credit

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for substantial assistance that he provided . . . in the [16 December 2016] case. And he's – the way that credit is going to be delivered is to, therefore – therefore, consolidate – consolidate all the cases into the [7 February 2018] event[.]

. . . .

Everything is consolidated into that one offense for – for a mandatory – *there was no substantial assistance in that case* – for the mandatory sentence in that one[.]

(Emphases added). It is not clear whether the trial court understood it could apply Defendant's substantial assistance to multiple cases on different dates—specifically, whether the trial court understood it could apply Defendant's substantial assistance regarding the 16 December 2016 offense to both that offense and the 7 February 2018 offense under N.C.G.S. § 90-95(h)(5). The trial court's potential failure to exercise discretion by applying substantial assistance to the 7 February 2018 offense could be prejudicial under *Baldwin*. *Baldwin*, 66 N.C. App. at 161, 310 S.E.2d at 782-83 (“Since there was evidence of [the] defendant's ‘substantial assistance’ before the trial court, the error was prejudicial.”).

¶ 29 As an initial matter, the Majority's assertion that “[t]he trial court did not err in concluding that [D]efendant's efforts did not rise to the level of substantial assistance to be applied to multiple offenses” is a de novo determination by a majority of a panel of this Court and misconstrues the role of our Court. *Supra* at ¶ 15. Further, it appears to apply a pre-*Baldwin* interpretation of the *availability* of sentence mitigation under N.C.G.S. § 90-95. *Id.* The appropriate issue that requires additional briefing is whether the trial court properly understood its ability to apply the substantial assistance mitigating factor to multiple offenses from multiple dates. If it did, then there was no error; if it did not, then Defendant is entitled to a new sentencing hearing. I would remand for further briefing regarding this issue and how this Court should interpret the language used by, and ruling of, the trial court.

2. Search of Residence

a. Failure to Announce

¶ 30 An additional potentially meritorious issue on appeal is whether law enforcement violated N.C.G.S. § 15A-249 during the execution of the 16 December 2016 search warrant, as depicted in State's Exhibit 1. *See* N.C.G.S. § 15A-249 (2019). A search warrant was issued on 16 December

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2016 for the search of Defendant's residence and a 2009 Honda Accord. N.C.G.S. § 15A-249 requires:

The officer executing a search warrant must, *before entering the premises, give appropriate notice* of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, *he must give the notice in a manner likely to be heard by anyone who is present.*

N.C.G.S. § 15A-249 (2019) (emphases added).

¶ 31 State's Exhibit 1, which depicts the search of Defendant's residence via a body camera worn by an officer executing the search warrant, shows law enforcement did not announce "police department, search warrant" until after opening both the storm door and the main door of the residence.

¶ 32 However, the Majority inaccurately portrays the evidence in this matter. According to the Majority, "[t]he video evidence of the warrant execution also shows that the law enforcement officers announced their presence before entering the residence, with [D]efendant standing nearby." *Supra* at ¶ 13. This statement is incorrect and incomplete for at least three reasons: (i) the sentence says "[t]he video evidence . . . shows . . . [D]efendant standing nearby[.]" but a review of State's Exhibit 1 does not show Defendant; (ii) a review of State's Exhibit 1 shows the screen door being opened *prior to* the announcement that police were there serving a search warrant; and (iii) a review of State's Exhibit 1 shows what appears to be the main door being opened *prior to* the announcement that police were there serving a search warrant, as analyzed below. *Id.*

i. Defendant's Presence

¶ 33 According to the plea hearing transcript, the State's attorney claimed the following during the presentation of the factual basis for the entry of the plea:

[Defendant] had been taken into custody on unrelated matters that same day and was brought back to the scene while the search warrant was being executed. . . . When they brought him back to the scene, they asked him prior to entering the scene if there was anything that could harm them in any way, any individuals in the house. He indicated that there was not

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anyone in the home; however, there was a shotgun inside of the house. He told them the location of the shotgun, and at that point, the warrant was executed.

Taking this statement by counsel for the State into account, it does not resolve how close Defendant was to the scene at the time of entry, though it would have been outside the view of the body camera in State's Exhibit 1, which panned the front yard. While I recognize the statement above is relevant to the notice issue, the Majority's conclusion regarding Defendant's "standing nearby" at the time of law enforcement's entry into the residence is not grounded in the video exhibit, testimony, or any findings of fact. *Id.* Additionally, the Majority does not resolve how this impacts the potential violation of Defendant's constitutional or statutory rights during the execution of the search warrant, which further underscores the need for briefing on this issue. Accordingly, I would remand in light of the following:

ii. Opening of the Storm Door

¶ 34

Approximately one minute and three seconds into State's Exhibit 1, law enforcement officers open the storm door of Defendant's residence. However, law enforcement did not announce "police department, search warrant" until around one minute and fifteen seconds into State's Exhibit 1, approximately twelve seconds after opening the storm door. In *Sabbath v. United States*, the Supreme Court of the United States, within the context of analyzing notice requirements for warrant execution, noted entry through a screen door was sufficient to constitute breaking and entering for the purposes of burglary, and drew a comparison between warrant execution and burglary regarding entry into a residence. *Sabbath v. United States*, 391 U.S. 585, 589 n.5, 20 L. Ed. 2d 828, 833 n.5 (1968) (marks and citations omitted) ("While distinctions are obvious, a useful analogy is nonetheless afforded by the common and case law development of the law of burglary: a forcible entry has generally been eliminated as an element of that crime under statutes using the word break, or similar words. . . . What constitutes breaking seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house,—even a closed screen door is a breaking."). According to the Supreme Court of the United States, "[a]n unannounced intrusion into a dwelling . . . is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or . . . open a closed but unlocked door." *Id.* at 590, 20 L. Ed. 2d at 834 (footnote omitted).

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¶ 35 Law enforcement's opening of the storm door before providing notice is an issue of arguable merit. I would instruct counsel on remand to provide briefing concerning whether law enforcement's opening of the storm door at Defendant's residence prior to providing notice constituted an entry of the premises to execute a search warrant prior to providing notice, in violation of the requirements of N.C.G.S. § 15A-249.

iii. Opening of the Main Door

¶ 36 At one minute and thirteen seconds into State's Exhibit 1, law enforcement appears to open the main door to Defendant's residence, approximately two seconds before announcing "police department, search warrant" at around one minute and fifteen seconds into State's Exhibit 1. According to N.C.G.S. § 15A-249, law enforcement must provide notice *before* entering the premises to execute a search warrant. N.C.G.S. § 15A-249 (2019). I note that "[t]he amount of time required between the giving of notice and entering the premises is dependent upon the circumstances of each case." *State v. Sumpter*, 150 N.C. App. 431, 434, 563 S.E.2d 60, 62 (2002); *see also State v. Gaines*, 33 N.C. App. 66, 69, 234 S.E.2d 42, 44 (1977).

¶ 37 Law enforcement's opening of the main door before providing notice is an issue of arguable merit. I would instruct counsel on remand to provide briefing concerning whether law enforcement's opening of the main door at Defendant's residence occurred prior to providing notice and whether such actions violated the requirements of N.C.G.S. § 15A-249.

b. Ineffective Assistance of Counsel

¶ 38 Defendant's trial counsel did not preserve issues regarding law enforcement's notice under N.C.G.S. § 15A-249 in the execution of the search warrant. This lack of preservation by trial counsel is an issue of arguable merit. I would instruct appellate counsel on remand to brief whether there was any related ineffective assistance of counsel claim for failing to preserve the second issue, regarding law enforcement's potential failure to provide appropriate notice under N.C.G.S. § 15A-249, for appeal.

CONCLUSION

¶ 39 After an *Anders* review of the Record, I have identified multiple issues of arguable merit—the application of Defendant's substantial assistance to sentence mitigation under N.C.G.S. § 90-95(h)(5) and whether law enforcement's execution of the search warrant violated the notice requirements of N.C.G.S. § 15A-249. I would allow Defendant's *Petition for Writ of Certiorari* for the limited purpose of remanding for the appointment of

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new appellate counsel and otherwise hold the petition in abeyance. On remand, I would instruct Defendant's new appellate counsel to provide briefing on the issues identified in this Dissent, as well as any additional issues of arguable merit. For these reasons, I respectfully dissent.

STATE OF NORTH CAROLINA

v.

TERRY LEE THORNE

No. COA20-750

Filed 5 October 2021

1. Appeal and Error—preservation of issues—statutory right to confront witnesses—probation revocation hearing—objection—insufficient

At a probation revocation hearing, where a law enforcement officer with no personal knowledge of the case testified to the contents of notes written by defendant's probation officer, defendant failed to preserve for appellate review his argument that the trial court violated his statutory right to confront witnesses (N.C.G.S. § 15A-1345(e)), despite objecting to the testimony, because he did not specify the statutory violation as the grounds for his objection, nor were such grounds apparent from context where defendant did not request his probation officer to appear at the hearing. Further, because defendant failed to properly invoke his confrontation rights, defendant's contention that the issue was preserved because the court violated a statutory mandate lacked merit.

2. Probation and Parole—revocation of probation—absconding—sufficiency of evidence

The trial court did not abuse its discretion by revoking defendant's probation for absconding where defendant admitted at the revocation hearing that, during a routine probation office visit, he told law enforcement he had taken drugs, was asked to provide a drug screening sample, and then left the office without authorization and without providing the sample. Further evidence showed that defendant's probation officer went twice to defendant's last known address, but defendant was not there, and that defendant did not contact the officer or the probation office for at least twenty-two days after walking out on his drug screen.

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3. Probation and Parole—clerical error—checked box on judgment form—multiple probation violations as independent grounds for revocation

After the trial court determined that defendant had absconded and had used illegal drugs while on probation, the order revoking defendant's probation was remanded where the court erroneously checked a box on the judgment form indicating that both probation violations independently justified revocation. The record indicated that the court revoked defendant's probation solely on grounds that defendant absconded, and therefore the checked box was deemed a clerical error in need of correction.

Appeal by Defendant from judgment entered 27 January 2020 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kyle Peterson, for the State-Appellee.

Gilda C. Rodriguez for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Terry Lee Thorne appeals a judgment revoking his probation and activating his suspended sentence. Defendant argues that the trial court violated his right to confrontation at the probation violation hearing, erred by revoking his probation based on a finding of absconding, and erred by revoking his probation based on a non-revocable violation. We affirm the trial court's order. However, we remand to the trial court to correct a clerical error in the judgment indicating that each of Defendant's violations were independently sufficient to support the revocation of Defendant's probation.

I. Background

¶ 2 On 7 July 2019, Defendant entered an *Alford* plea¹ to one count of conspiracy to obtain property by false pretenses. The trial court sentenced Defendant to 10 to 21 months in prison, suspended this sentence, and placed Defendant on 36 months of supervised probation.

1. An *Alford* plea is a guilty plea in which the defendant does not admit to any criminal act, but admits that there is sufficient evidence to convince the judge or jury of the defendant's guilt. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Baskins*, 260 N.C. App. 589, 592 n.1, 818 S.E.2d 381, 387 n.1 (2018).

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¶ 3 On 16 August 2019, Officer Eric Phillips, then Defendant’s probation officer, filed a Violation Report (“Report”). In the Report, Phillips attested under oath that

[D]efendant has willfully violated . . . [the] Condition of Probation [to] “Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it . . .” in that on August 05, 2019, during a[] routine office visit, the offender admitted to using marijuana and cocaine and signed the DCC-26 form. When attempting to gain a sample, the offender advised that he could not use the restroom. PO asked him to have a seat in the lob[b]y until he could produce a sample. The defendant left the office building without giving a sample. (original capitalization omitted).

¶ 4 On 27 August 2019, Phillips filed an addendum to the Report (“Addendum”) in which he attested under oath that

[D]efendant has willfully violated . . . [the] Regular Condition of Probation: General Statute 15A-1343 (b)(3a) “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to the supervising probation officer” in that, on August 5, 2019 the defendant left the office after probation requested a drug screen knowing that he would test positive for the use of marijuana and admitting the same. To date he has failed [to] make any contact with the probation department or his officer and has made his whereabouts unknown to his supervising officer or the probation department, therefore statutory [sic] absconding supervision. (original capitalization omitted).

¶ 5 The trial court held a probation violation hearing on 27 January 2020. Defendant admitted that “during a routine office visit, [he had] admitted to using marijuana and cocaine on August 5th, 2019, and that when he was asked to provide a sample, [he] left the probation office and failed to provide a sample.” Defendant denied the allegation that he absconded.

¶ 6 Jeremy Locus, an employee of Adult Probation and Parole, testified for the State. Locus was not Defendant’s supervising parole officer.

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Neither Phillips nor Defendant's supervising officer at the time of the hearing appeared or testified. When Locus testified that he did not personally have any information about the case, Defendant objected to further testimony on the grounds that Locus was "going to read from a file . . . from somebody," was "not even involved in the case," and did not "know any details about the matter[.]" The trial court overruled the objection and permitted Locus to testify to the contents of Phillips' notes.

¶ 7 According to Phillips' notes, on 5 August 2019, "[D]efendant was asked to provide a drug sample after admitting that he would be positive for marijuana and cocaine"; Defendant indicated he could not use the bathroom; and after Phillips asked Defendant to wait until he could provide a sample, Defendant left the building and did not return. On Sunday, 18 August 2019, Phillips went to Defendant's last known address to locate Defendant, but Defendant was not there. Phillips left a message with Defendant's relatives asking Defendant to report to the probation office by the next Wednesday morning, 21 August. Phillips returned to Defendant's last known address on 20 August but was again unable to locate Defendant. Defendant never reported to the office.

¶ 8 Defendant also testified. He acknowledged that he had used marijuana and cocaine and had admitted to doing so when he met Phillips on 5 August. Defendant testified, however, that Phillips told him he could leave when he was still unable to produce a sample after ten to fifteen minutes of waiting in the office. Defendant further testified that when Phillips went to his house, Defendant was either working or with his nephew, and he had unsuccessfully attempted to set up an appointment with Phillips. Defendant acknowledged that he never returned to the probation office but explained that Phillips had told Defendant that he would call and arrange an appointment for Defendant to come by.

¶ 9 Following the hearing, the trial court entered a Judgment and Commitment Upon Revocation of Probation. The trial court found that Defendant had violated his conditions of probation as alleged in the Report and Addendum, revoked Defendant's probation, and activated his suspended sentence. Defendant filed a notice of appeal on 5 February 2020.

II. Appellate Jurisdiction

¶ 10 We must first address whether Defendant's appeal is properly before this Court. A written notice of appeal in a criminal proceeding must be filed with "the clerk of superior court and serv[ed] . . . upon all adverse parties within fourteen days after entry of the judgment or order[.]" N.C. R. App. P. 4(a)(2). The notice "shall specify the party or parties taking

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the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.” N.C. R. App. P. 4(b). Compliance with these requirements for giving notice of appeal is jurisdictional. *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012).

¶ 11 While Defendant’s *pro se* notice is signed and specifies that he is the party taking appeal, it does not clearly “designate the judgment or order from which appeal is taken and the court to which appeal is taken.” N.C. R. App. P. 4(b). Instead, Defendant’s notice states only, “I would like to appeal my probation violation that was heard on January 27th, 2020.” Additionally, Defendant failed to properly serve his notice of appeal on the State.

¶ 12 Recognizing these defects in the notice of appeal, Defendant has filed a petition for a writ of certiorari seeking this Court’s review of the 27 January 2020 judgment. This Court may issue a writ of certiorari “in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant’s petition and review the merits of his appeal.

III. Discussion

A. Confrontation Right

¶ 13 [1] Defendant first argues that the trial court violated his right under N.C. Gen. Stat. § 15A-1345(e) to confront Phillips by permitting Locus to testify over Defendant’s objection. Defendant has failed to preserve this issue for appellate review.

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.

N.C. R. App. P. 10(a)(1). At a probation violation hearing, a probationer “may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.” N.C. Gen. Stat. § 15A-1345(e) (2019).

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¶ 14 In the present case, the following exchange took place at the hearing:

[Prosecutor:] And do you supervise the defendant, Terry Thorne?

[Locus:] No, I do not. This case belongs to Officer Patterson right now, but at the time of this violation, it belonged to Officer Eric Phillips.

[Prosecutor:] And is he no longer with Adult Probation and Parole?

[Locus:] That's correct.

[Prosecutor:] Okay. Now, do you have any information about this case?

[Locus:] I do not.

[Defense Counsel:] I mean, he's going to read from a file, Judge, from somebody. He's not even involved in the case; doesn't know any details about the matter, Judge, and I would object.

[The Court:] Overruled.

¶ 15 Defendant did not state that the legal basis for his objection was his statutory confrontation right, nor was that ground apparent from context. Defendant did not request to cross examine Phillips, did not request Phillips' presence at the hearing, and did not request Phillips be subpoenaed and required to testify. At most, it could be inferred that Defendant objected to Locus testifying because Locus did not have personal knowledge of the underlying events,² and because Locus's reading from Officer Phillips' case notes constituted inadmissible hearsay.³

¶ 16 Defendant argues that, notwithstanding his failure to object, the issue of the confrontation right under section 15A-1345(e) is preserved because the trial court acted contrary to a statutory mandate. We disagree.

2. See N.C. Gen. Stat. § 8C-1, Rule 602 (2020) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.").

3. See N.C. Gen. Stat. § 8C-1, Rule 801(c) (2020) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); N.C. Gen. Stat. § 8C-1, Rule 802 (2020) ("Hearsay is not admissible except as provided by statute or by these rules.").

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¶ 17 It is true that “[w]hen a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.” *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000). Here, however, the trial court did not act contrary to a statutory mandate because Defendant’s objection was insufficient to trigger the trial court’s obligation under section 15A-1345(e) to either permit cross-examination of Phillips or find good cause for disallowing confrontation. Under these circumstances, Defendant has failed to preserve for appellate review the issue of his right to confrontation under section 15A-1345(e).

B. Absconding

¶ 18 [2] Defendant next argues that the trial court erred by revoking his probation based on a finding of absconding because the behavior alleged in the Report and Addendum, and the evidence presented at the hearing, did not show absconding.

¶ 19 As a regular condition of probation, a defendant placed on supervised probation must “[n]ot abscond by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer[.]” N.C. Gen. Stat. § 15A-1343(b)(3a) (2019). A trial court may revoke probation where a defendant absconds. N.C. Gen. Stat. § 15A-1344(a) (2019).

An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quotation marks and citations omitted).

¶ 20 The Report, the Addendum, and Locus’ testimony at the hearing tended to show that Defendant left the probation office on 5 August without authorization and then failed to appear or otherwise contact his probation officer or the probation office for at least 22 days. Phillips went twice to Defendant’s last known address to locate Defendant, but Defendant was not there, and Defendant did not report to the probation

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office after Phillips left a message with Defendant's relatives asking him to do so.

¶ 21 Relying on *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), Defendant contends that the State's evidence only showed that he violated the condition that a probationer "permit the [probation] officer to visit him at reasonable times," N.C. Gen. Stat. § 15A-1343(b)(3), which by itself cannot justify revocation, N.C. Gen. Stat. § 15A-1344(a). Defendant's reliance is misplaced. In *Williams*, the probation officer was able to speak with the defendant by phone on several occasions, and ultimately learned his location, though the defendant had failed to inform the officer of his address, missed appointments with the officer, and was travelling out of state without permission. *Williams*, 243 N.C. App. at 198-99, 776 S.E.2d at 742. We agreed with defendant that these facts did not amount to absconding under section 15A-1343(b)(3a) and held that the State may not "convert violations" of requirements for which probation is not revocable "into a violation of [section] 15A-1343(b)(3a)." *Id.* at 205, 776 S.E.2d at 745-46. Here, the State presented evidence that Phillips was twice unable to locate Defendant at his last known address; Defendant failed to report to Phillips despite a message left with his family requesting that he do so; and unlike in *Williams*, Defendant otherwise failed to contact or make his whereabouts known to Phillips for a 22-day period.

¶ 22 Defendant also emphasizes portions of his testimony that contradict the State's evidence. But because the trial court sat as the finder of fact in the probation revocation hearing, N.C. Gen. Stat. § 15A-1345(e), it had discretion to determine the weight and credibility of the evidence, *Sellers v. Morton*, 191 N.C. App. 75, 79, 661 S.E.2d 915, 920 (2008). In these circumstances, the trial court did not abuse its discretion in revoking Defendant's probation on the basis that Defendant had absconded, in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). We affirm the portion of the trial court's judgment revoking Defendant's probation and activating his sentence.

C. Clerical Error

¶ 23 **[3]** Defendant lastly argues that the trial court erred by revoking his probation for the commission of a criminal offense based on his use of illegal drugs because the Report alleged only that this was a non-revocable violation of probation.

¶ 24 The Report alleged only that Defendant had violated the condition to "[n]ot use, possess or control any illegal drug or controlled substance[.]" not that he had committed a new criminal offense. The

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Addendum alleged only that Defendant had absconded. The trial court found that Defendant violated his conditions of probation as alleged in both the Report and Addendum. Although only the Addendum alleged a revocable violation, *see* N.C. Gen. Stat. § 15A-1344(a), the trial court checked the box on the form judgment indicating that “[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.”

¶ 25 The State contends that this was a clerical error and not grounds for reversal. “A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (quotation marks, brackets, and citations omitted). Because the checked box on the form judgment indicating that both violations found by the trial court independently justified revocation is unsupported by the record, contradicted by the plain language of section 15A-1344(a), and appears to be a clerical error, we remand to the trial court for correction. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (“When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” (quotation marks omitted)).

IV. Conclusion

¶ 26 Defendant failed to preserve the issue of the right to confront his former probation officer at the violation hearing. The trial court did not abuse its discretion by revoking Defendant’s probation for absconding but did commit a clerical error by checking the box indicating that each violation found by the trial court independently justified revocation. Accordingly, we affirm the trial court’s revocation of probation, but remand for correction of the clerical error.

AFFIRMED; REMANDED WITH INSTRUCTIONS.

Judges DIETZ and GORE concur.

TREADAWAY v. PAYNE

[279 N.C. App. 664, 2021-NCCOA-535]

LAURA ELIZABETH (LAIL) TREADAWAY, BRADLEY CHARLES LAIL AND
GRAHAM SCOTT LAIL, PLAINTIFFS

v.

CHARLES RAY PAYNE, INDIVIDUALLY, AND BRYAN C. THOMPSON, AS PUBLIC
ADMINISTRATOR FOR THE ESTATE OF CHARLES MELTON MULL, DEFENDANTS

No. COA20-861

Filed 5 October 2021

Wills—patent ambiguity—personal property—testator’s intent

Where a will contained a patent ambiguity regarding certain property—by bequeathing “all my personal property” to defendant but making conflicting bequests of specific personal property to others—the trial court properly resolved the discord in light of the prevailing purpose of the entire will and relevant attendant circumstances, concluding that certain contested property was intended to pass to plaintiffs rather than defendant.

Appeal by defendant Charles Ray Payne from judgment and order entered 21 July 2020 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 24 August 2021.

Craig Jenkins Liipfert & Walker LLP, by William W. Walker, for plaintiffs-appellees.

Crumpler Freedman Parker & Witt, by Stuart L. Brooks, for defendant-appellant Charles Ray Payne.

ZACHARY, Judge.

¶ 1 Defendant-appellant Charles Ray Payne appeals from the trial court’s order and declaratory judgment determining that the will of Charles Melton Mull (“Testator”) contained a patent ambiguity; construing Testator’s intent to convey certain of his property to Plaintiffs-appellees Laura Treadaway, Bradley Lail, and Scott Lail (collectively, “Plaintiffs”); and concluding that Defendant was liable to Plaintiffs for conversion. After careful review, we affirm.

Background

¶ 2 This appeal concerns the trial court’s interpretation of the phrase “personal property” as used in Testator’s will. Specifically, at issue is the proper disposition of the funds and securities (collectively, “the

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contested property”) held in Testator’s Ameritrade investment account and Wells Fargo checking, savings, and brokerage accounts, as well as Testator’s interest in Furniture Enterprises of Hickory. Defendant argues that Testator’s will clearly evidences Testator’s intent to bequeath the contested property to him, while Plaintiffs argue that Testator intended that the contested property pass to them.

¶ 3 On 21 February 2018, Testator executed his last will and testament (the “Will”). In his Will, Testator appointed Defendant—with whom Testator had lived from 1994 to 2001 and again from 2015 until Testator’s death on 1 May 2018—to serve as the executor of his estate. Defendant is named in the Will as a beneficiary of Testator’s estate, as are Plaintiffs.

¶ 4 Throughout his Will, Testator repeatedly refers to his “personal property” or “personal possessions.” Article III of the Will first provides, in pertinent part:

Subject to the special bequests in Article V, I *bequeath and devise all my personal property*, including my automobile, furniture, clothing, watches, rings, electronics, art and any currency which I may have on my person, in my home or in my automobile in fee simple to my partner, [Defendant].

(Emphasis added).

¶ 5 Article III then directs the executor to sell the condominium in which Defendant and Testator resided no sooner than six months after Testator’s death, during which time the executor “shall be entitled to *sell [Testator’s] personal possessions* (which have not been listed herein as being devised to [Testator’s] partner, [Defendant]).” (Emphasis added). Article III continues:

After the end of the said six months after my demise, I direct my Executor to sell *all of my remaining personal possessions at the condominium; . . .*

The net proceeds from the sale of the personal possessions and the condominium shall be used to fund my bequest set forth in Article V, with the remaining sale proceeds hereby devised in fee simple to my partner, [Defendant].

(Emphases added).

¶ 6 Article IV names Plaintiffs—Testator’s niece and nephews—as the residuary beneficiaries of the Will:

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All the residue of the property which I may own at the time of my death, real or personal, tangible and intangible, of whatever nature and wheresoever situated, including all property which I may acquire or become entitled to after the execution of this will, including all lapsed legacies and devises, or other gifts made by this will which fail for any reason, I bequeath and devise, in fee simple in equal shares, subject to special bequests in Article V, to [Plaintiffs].

¶ 7 Article V sets forth the specific bequests referenced in Articles III and IV, items (a)–(i) of which constitute a series of bequests of specific sums of money to particular named individuals, together with other bequests of personal property:

j. I bequeath and devise *any funds I may have at the time of my demise with the Winston-Salem Foundation, to the University of North Carolina School of the Arts in Winston-Salem, North Carolina*, to be used for landscaping and outside art.

k. I bequeath and devise *any outstanding loan balance owed to me by Jeff Propst or his successors at the time of my demise in equal shares to [Plaintiffs]*.

l. I direct that *any motor vehicles I may own at the time of my demise* be sold within thirty days of my demise. I bequeath and devise *all of the net proceeds from the said sales to the University of North Carolina School of the Arts in Winston-Salem, North Carolina*.

(Emphases added).

¶ 8 Following Testator's death on 1 May 2018, the Forsyth County Clerk of Court admitted the Will to probate, and on 4 June 2018, Defendant qualified as executor of the estate. In the fall of 2018, Defendant sold the condominium, used the proceeds from its sale to satisfy the Article V specific bequests, and transferred the net proceeds into a personal account in his name. Defendant also closed Testator's Wells Fargo and Ameritrade accounts and transferred the proceeds from these accounts into his personal accounts.

¶ 9 On 10 July 2019, Plaintiffs filed a complaint in Forsyth County Superior Court, seeking a declaratory judgment as to whether the Will contained a patent ambiguity with regard to the meaning of the phrase

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“personal property” and whether the contested property passed to Plaintiffs as residuary beneficiaries under the provisions of Article IV of the Will. Plaintiffs also asserted claims for conversion and breach of fiduciary duty, and moved the trial court for injunctive relief, requesting that the contested property be held in escrow pending resolution of the parties’ dispute. On 15 July 2019, the trial court entered a consent order reflecting the parties’ agreement that Defendant would freeze the accounts holding the contested property pending further order of the court.

¶ 10 On 16 September 2019, Defendant filed a motion to dismiss Plaintiffs’ complaint. With the parties’ consent, the Clerk of Court removed Defendant as executor and appointed Bryan C. Thompson, the Public Administrator, to serve as administrator c.t.a. of the estate.¹ Plaintiffs filed an amended complaint on 30 October 2019, naming Thompson in his representative capacity as a party to this action, and then filed a motion for summary judgment the following day. On 14 November 2019, Defendant filed a motion to dismiss the amended complaint. On 21 November 2019, the trial court entered an order denying both Plaintiffs’ motion for summary judgment and Defendant’s motion to dismiss.

¶ 11 On 29 June 2020, the matter came on for trial in Forsyth County Superior Court before the Honorable David L. Hall. On 21 July 2020, the trial court entered its order and declaratory judgment in which it concluded, *inter alia*, that (1) the Will contained a patent ambiguity with respect to the phrase “personal property” as used in Articles III, IV, and V; (2) the contested property and Testator’s interest in Furniture Enterprises passed to Plaintiffs as residuary beneficiaries; and (3) Defendant was liable to Plaintiffs for conversion of the proceeds from Testator’s closed Wells Fargo and Ameritrade accounts. The trial court further determined that Defendant was not liable to Plaintiffs for breach of fiduciary duty. Defendant timely filed notice of appeal.

Discussion

¶ 12 On appeal, Defendant argues that (1) the trial court erred by concluding that the Will contained a patent ambiguity requiring judicial construction, and (2) the trial court’s conclusions of law are not supported by the text of the Will or Testator’s circumstances at the time that the Will was executed.

1. Thompson is a party to this action in his representative capacity only, and he has not participated in this appeal.

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I. Standards of Review

¶ 13 “The interpretation of a will’s language is a matter of law.” *Brawley v. Sherrill*, 267 N.C. App. 131, 133, 833 S.E.2d 36, 38 (citation omitted), *appeal dismissed*, 373 N.C. 587, 835 S.E.2d 463 (2019). We review questions of law de novo. *Id.*

¶ 14 “The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court’s findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court’s findings of fact are conclusive on appeal.” *Nelson v. Bennett*, 204 N.C. App. 467, 470, 694 S.E.2d 771, 774 (2010) (citation omitted). “Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.” *In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020) (citation and internal quotation marks omitted).

II. Patent Ambiguity

¶ 15 Defendant argues that the trial court’s conclusion that the Will contained a patent ambiguity as to the phrase “personal property” is not supported by the text of the Will, is “speculative about Testator’s intent, and fails to adhere to our law’s principles of testamentary interpretation.” We disagree.

¶ 16 “Whenever the meaning of a will or a part of a will is in controversy, the courts may construe the provision in question and declare its meaning.” *Mitchell v. Lowery*, 90 N.C. App. 177, 179–80, 368 S.E.2d 7, 8, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 547 (1988). It is well settled that “the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy.” *Brawley*, 267 N.C. App. at 133, 833 S.E.2d at 38 (citation omitted). “The interpretation of any will is as simple, or complicated, as its language. Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; . . . the words of the testator must be taken to mean exactly what they say.” *Id.* at 134, 833 S.E.2d at 38 (citation and internal quotation marks omitted). “Resort to canons of construction is warranted only when the provisions of a will are set forth in unclear, equivocal, or ambiguous language.” *Id.*

¶ 17 “[W]here parts of the will are dissonant or create an ambiguity, the discord thus created must be resolved in light of the prevailing purpose of the entire instrument.” *Mitchell*, 90 N.C. App. at 180, 368 S.E.2d at 9. “In attempting to determine the testator’s intention, the language used,

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and the sense in which it is used by the testator, is the primary source of information, as it is the expressed intention of the testator which is sought.” *Brawley*, 267 N.C. App. at 133–34, 833 S.E.2d at 38 (citation omitted). “To ascertain the intent of the testator, the will must be considered as a whole. If possible, meaning must be given to each clause, phrase and word. If it contains apparently conflicting provisions, such conflicts must be reconciled if this may reasonably be done.” *Wachovia Bank & Tr. Co. v. Wolfe (Wolfe II)*, 245 N.C. 535, 537, 96 S.E.2d 690, 692 (1957).

¶ 18 In the present case, the trial court concluded that the Will contained a patent ambiguity “in its description and attempts to devise personal property,” with “several inconsistent passages that are mutually exclusive[.]” “[A] patent ambiguity occurs when doubt arises from conflicting provisions or provisions alleged to be repugnant.” *Wachovia Bank & Tr. Co. v. Wolfe (Wolfe I)*, 243 N.C. 469, 478, 91 S.E.2d 246, 253 (1956). “The meaning of the word ‘property’ and of the words ‘personal property’ varies according to the subject treated . . . and according to the context.” *Poindexter v. Wachovia Bank & Tr. Co.*, 258 N.C. 371, 379, 128 S.E.2d 867, 874 (1963). “Courts have frequently held that the words ‘personal property’ are susceptible of two meanings: one, the broader, including all property which is the subject of ownership, except land or interests in land; the other, more restricted, oftentimes embraces only goods and chattels.” *Id.* at 379–80, 128 S.E.2d at 874. “These words, ‘personal property,’ have a popular meaning different from their technical meaning, and are frequently used as including goods and chattels only, and embracing such movable and tangible things as are the subject of personal use.” *Id.* at 380, 128 S.E.2d at 874.

¶ 19 Here, the trial court correctly determined that Testator’s Article III bequest of “all my personal property” to Defendant conflicts with other provisions of his Will. For instance, subsection (d) of Article III permits the executor “to sell [Testator’s] personal possessions (which have not been listed herein as being devised to [Testator’s] partner, [Defendant]).” This authorization suggests that Testator intended that there would be personal possessions that were not otherwise included as part of the bequest to Defendant of “all [Testator’s] personal property[.]” Similarly, Article III also directs the executor to sell “all [Testator’s] remaining personal possessions at the condominium” and to use the net proceeds from these sales to fund some of the specific bequests in Article V. However, the very existence of “remaining personal possessions at the condominium” is incompatible with a bequest of “all [Testator’s] personal property” to Defendant. In addition, the provisions of Article V, subsection (1) are unquestionably inconsistent with the provisions of Article III bequeath-

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ing all of Testator's personal property to Defendant. Subsection (I) expressly requires the sale of "any motor vehicles [Testator] may own at the time of [Testator's] demise" and specifically directs that the net-sales proceeds be distributed to the University of North Carolina School of the Arts, while "[Testator's] automobile" was left to Defendant in Article III.

¶ 20 That there is discord in the language employed by Testator in his Will is beyond cavil, and judicial construction was therefore appropriate to ascertain his intent, "in light of the prevailing purpose of the entire instrument." *Mitchell*, 90 N.C. App. at 180, 368 S.E.2d at 9. Thus, the trial court did not err in concluding that the Will contained a patent ambiguity in the various provisions regarding Testator's "personal property." Having so concluded, we turn to Defendant's second argument, concerning the trial court's construction of the Will.

III. Construction of the Will

¶ 21 In determining that the Will contained a patent ambiguity, the trial court made the following findings of fact, which Defendant challenges on appeal:

47. The Will, in its description and attempts to devise personal property, contains several inconsistent passages that are mutually exclusive, including, without limitation, Article III, lines 1-4; Article III, paragraph two, subsection (d); Article III, paragraph three, lines 1-2; Article III, paragraph four (in its entirety); Article V, paragraph 1, lines 1-2 and Article V, subsections (j), (k), and (l).

48. The inconsistent descriptions of personal property as described herein, without limitation, cannot be construed, nor Testator's intent be determined, without considering the circumstances attendant to the Testator and the Will.

¶ 22 These findings of fact are supported by competent evidence, and thus are conclusive on appeal. *See Nelson*, 204 N.C. App. at 470, 694 S.E.2d at 774. However, Defendant contends that these findings of fact are actually conclusions of law, to be reviewed de novo. "Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951). This is a distinction without a difference here, where we have independently reached the same conclusions, as discussed above. Defendant's challenge to these findings of fact is overruled.

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¶ 23 Defendant further challenges that portion of the trial court's finding of fact #49 specifically construing Testator's intent:

f. The terms of the Will that are not ambiguous, as well as the circumstances attendant to the Testator's life and the making of the Will, as found above by the undersigned, demonstrate that Testator intended that all other intangible personal property, including his interest in the family business Furniture Enterprises of Hickory, and monies and securities Testator had in investment accounts with Ameri[t]rade and Wells Fargo at the time of his death, pass to the residuary beneficiaries ([P]laintiffs), as set forth in Article IV, the Residue of Testator's Estate[.]

¶ 24 Defendant generally challenges the trial court's interpretation of Testator's intent, which the record reflects that the court gleaned from the text of the Will and "the circumstances attendant to the Testator's life and the making of the Will[.]" Indeed, Defendant repeatedly refers to his contentions as the "plain text" or "plain language" interpretation of Testator's Will. Consequently, he posits that no ambiguity exists, stating that "the trial court made *no* specific findings to justify the conclusion that the terms of the Will should be re-cast or to establish Plaintiffs should take the contested property." However, we have already concluded that the text of the Will is patently ambiguous as to the personal property in question. Accordingly, there are no "re-cast" terms; there is only the trial court's attempt to reconcile the "apparently conflicting provisions" of the Will as reasonably as may be done in discerning Testator's intent. *Wolfe II*, 245 N.C. at 537, 96 S.E.2d at 692.

¶ 25 Further, Defendant does not challenge the preceding portions of finding of fact #49—subsections (a) through (e)—that detail the relevant, unambiguous provisions of the Will and explain Testator's intent as to each of those provisions. The trial court meticulously analyzed Testator's intent, as best it could be ascertained from the text of the Will's unambiguous provisions and from the relevant attendant circumstances:

a. Testator intended in Article III that Testator's residence . . . (hereinafter referred to as "Residence"), which he shared with [D]efendant, be held in trust by [D]efendant upon Testator's death for no fewer than six (6) months, and that [D]efendant thereafter sell the Residence in order to fund the special devises found in Article V, subsections (a) through

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(i), with the remaining proceeds from the sale of the Residence to pass to [D]efendant in fee simple;

b. Testator intended that [D]efendant be allowed to remain at the Residence, which Testator had shared with [D]efendant, for at least six (6) months after Testator's death; Testator's intention was to give [D]efendant flexibility to maximize the funds going to [D]efendant from the sale of the Residence;

c. Testator intended that [D]efendant hold Testator's items of tangible personal property, located in the Residence or on Testator's person, in trust for no fewer than six (6) months following Testator's death, including inherently personal items of tangible personal property such as Testator's valuable fine art collection, personal effects in the Residence, cash money on Testator's person or in the Residence, furnishings in the Residence, and other items of tangible personalty located in the Residence, in the event that those items of tangible personal property should be needed to fund Testator's special devises listed in Article V, subsections (a) through (i), and if not needed to fund the special devises, pass to [D]efendant in fee simple;

d. Testator specifically intended that certain intangible personal property, such funds held by the Winston-Salem Foundation, be distributed to the North Carolina School of the Arts upon Testator's death, as provided in Article V, subsection (j);

e. Testator specifically intended that certain intangible personal property, such as monies owed to Testator by Jeff Propst and reflected in the Promissory Note in favor of Testator . . . , pass to [P]laintiffs upon Testator's death, as provided in Article V, subsection (k)[.]

¶ 26

These unchallenged findings of fact—which are binding on appeal, *Harper*, 269 N.C. App. at 215, 837 S.E.2d at 604—support the trial court's construction of Testator's intent with respect to the contested property. The trial court's thorough analysis reflects an examination of Testator's intent that squares the initial bequest of all of Testator's personal property, and the repeated conflicting bequests of Testator's personal property thereafter, with Testator's evident intent to leave certain intangible property, which the trial court determined included the contested property, to

**WAKE RADIOLOGY DIAGNOSTIC IMAGING LLC v. N.C. DEPT OF
HEALTH & HUM. SERVS.**

[279 N.C. App. 673, 2021-NCCOA-536]

Plaintiffs. After careful review of the trial court’s analysis, we conclude that the trial court properly resolved the discord created by the patent ambiguity “in light of the prevailing purpose of the entire instrument.” *Mitchell*, 90 N.C. App. at 180, 368 S.E.2d at 9. We are unpersuaded by Defendant’s arguments to the contrary. Accordingly, we affirm the trial court’s order and declaratory judgment.

Conclusion

¶ 27

The trial court did not err in concluding that Testator’s Will contained a patent ambiguity as regards the contested property. Nor did the trial court err in interpreting Testator’s intent from the text of the Will and the relevant attendant circumstances. Thus, the trial court’s order and declaratory judgment is affirmed.

AFFIRMED.

Judges MURPHY and GORE concur.

 WAKE RADIOLOGY DIAGNOSTIC IMAGING LLC, PETITIONER

v.

 NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION
OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING AND CERTIFICATE
OF NEED, RESPONDENT, AND THE BONE AND JOINT SURGERY CLINIC, LLP,
RESPONDENT-INTERVENOR

No. COA20-759

Filed 5 October 2021

**Hospitals and Other Medical Facilities—certificate of need—MRI
scanner—change in project—new institutional health service**

Where the Department of Health and Human Services (DHHS) issued a certificate of need (CON) to an orthopedic surgery clinic for a limited-use, fixed extremity MRI scanner as part of a state-sponsored research project, and where the clinic was allowed to replace the scanner with a more advanced model many years later, DHHS had the authority under N.C.G.S. § 131E-176(16)(e) to approve the clinic’s application for a new CON—which removed the use restrictions under the original CON—without requiring a traditional need determination or competitive review process. Under a plain reading of section 131E-176(16)(e), DHHS could issue the new

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CON because the clinic's application sought a "change in project" within one year after state health officials chose to end the research project, and the change would allow for additional MRI scanning services at a diagnostic center that was established under the project.

Appeal by petitioner from final decision entered 12 June 2020 by Administrative Law Judge Stacey Bice Bawtinheimer in the Office of Administrative Hearings. Heard in the Court of Appeals 10 August 2021.

Wyrick Robbins Yates & Ponton LLP, by Frank Kirschbaum and Charles George, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, and Forrest W. Campbell, Jr., for intervenor-appellee.

DIETZ, Judge.

¶ 1 In North Carolina, health care providers cannot acquire a new MRI scanner (or most other types of medical equipment) without permission from the State in the form of a "certificate of need." In the typical scenario, State health experts would first determine that there is a need for another MRI scanner in a particular community, and then interested providers would apply to the State and fight over whose application should be accepted, with the winner ultimately getting the new piece of equipment.

¶ 2 This case is not the typical scenario. Fifteen years ago, State health experts identified a need for a "demonstration project" in Wake County. That project required a provider to acquire an MRI scanner solely for extremity scans, not whole-body scans. State health officials wanted to use the demonstration project to assess whether this type of limited-use MRI scanner would save patients money.

¶ 3 Bone and Joint Surgery Clinic received a certificate of need for use with this demonstration project and acquired an MRI scanner. The certificate of need stated that the MRI machine would create a "diagnostic center" at Bone and Joint's location to carry out the demonstration project. Many years later, during an office move, the MRI scanner was destroyed. Bone and Joint got permission to replace it with a more

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advanced MRI machine, but only if it used the new machine for the limited functions in the existing certificate of need.

¶ 4 The following year, State health experts ended the demonstration project and recategorized Bone and Joint's MRI scanner as just another scanner of the many located in Wake County. Bone and Joint then applied for a new certificate of need that removed the existing restrictions, so it could use its current MRI scanner to its full capabilities. The agency approved that request.

¶ 5 As a result, Bone and Joint acquired a whole-body MRI scanner without having to compete with other health care providers to get it. Wake Radiology Diagnostic Imaging, one of those potential competitors, challenged the agency's decision. An administrative law judge ruled against Wake Radiology and this appeal followed.

¶ 6 We affirm. By law, State regulators can change the scope of an existing certificate of need if the change was proposed "within one year after the project was completed" and the change concerned "the addition of a health service that is to be located in the facility . . . that was . . . developed in the project." N.C. Gen. Stat. § 131E-176(16)(e).

¶ 7 Here, within one year after the demonstration project ended, Bone and Joint applied for a change to offer additional MRI services at the diagnostic center created when it initially acquired its limited-use MRI scanner. That application falls squarely within the plain language of N.C. Gen. Stat. § 131E-176(16)(e) and we therefore hold that the agency properly issued the challenged certificate of need. Wake Radiology contends that this plain reading of the statute creates a loophole, allowing an end-run around the intended need determination and competitive review process. That is not a concern for this Court. We interpret the law as it is written. If that interpretation results in an unintended loophole, it is the legislature's role to address it.

Facts and Procedural History

¶ 8 In 2006, Bone and Joint Surgery Clinic applied for a certificate of need (CON) to obtain a .23T fixed extremity MRI scanner to be used for a "demonstration project" under the State Medical Facilities Plan. The Department of Health and Human Services awarded Bone and Joint the requested CON in March 2007.

¶ 9 The designated scope of this CON was to "[a]cquire a fixed extremity MRI scanner resulting in the establishment of a diagnostic center."

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The CON imposed a number of conditions on Bone and Joint designed to achieve the goals of the demonstration project.

¶ 10 First, it limited the use of the .23T MRI scanner to extremity scans and not “whole body scans.” Second, it required Bone and Joint to conduct a “research study” meant to provide insight into the “convenience, cost effectiveness and improved access” provided by this limited-use MRI machine. The ultimate goal was to “demonstrate any cost savings to the patient or third party payer” from this sort of use of an MRI scanner.

¶ 11 Finally, the CON required Bone and Joint to submit annual reporting to both DHHS and the State Health Coordinating Council for three years. Although this reporting requirement lasted only for three years, the demonstration project continued, and Bone and Joint continued to use the .23T MRI scanner for many years after the reporting requirement ended.

¶ 12 In 2016, nearly a decade after receiving the initial CON, Bone and Joint applied for an exemption from CON review to purchase a replacement .23T MRI scanner machine for the same purpose and use as the existing machine. DHHS granted this exemption with no appeal.

¶ 13 Then, in 2018, Bone and Joint’s existing .23T MRI machine was destroyed during an office move. Bone and Joint again applied for a CON exemption to obtain replacement equipment. This time, Bone and Joint asked to purchase a 3.0T MRI scanner—a machine with greater imaging functionality than its existing .23T MRI scanner—but only for the same use and purpose as its existing machine. DHHS granted this exemption as well.

¶ 14 Wake Radiology appealed this agency decision as an “affected person” under N.C. Gen. Stat. § 131E-188(b). In 2019, an administrative law judge concluded that, although the 3.0T MRI scanner had greater capabilities than the .23T MRI scanner it would replace, it still constituted “replacement equipment under N.C. Gen. Stat. § 131E-176(22a).” But the ALJ also ruled that “operation of the replacement MRI is conditioned on conformance with the March 28, 2007 Certificate of Need”; that the new 3.0T “MRI must be used for the same diagnostic or treatment purposes”; and that Bone and Joint “is entitled to use the 3.0 Tesla to perform only the types of studies previously done with the extremity scanner it replaces, unless and until the certificate of need is modified or replaced.” Again, there was no appeal of this decision.

¶ 15 Several months later, on 29 May 2019, the State Health Coordinating Council declared that the 2007 demonstration project concerning Bone

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and Joint's MRI scanner was now complete. As a result, Bone and Joint's 3.0T MRI machine moved from the demonstration project category into the State's regular MRI inventory category in the 2020 State Medical Facilities Plan. This decision was approved by the Governor.

¶ 16 On 15 August 2019, Bone and Joint applied to DHHS for a new CON so that it could use the 3.0T MRI scanner to its full capability, consistent with its designation in the State Medical Facilities Plan.

¶ 17 The agency reviewed the application and determined that a need assessment and full competitive review process were not required. But the agency chose to solicit public comment and hold a public hearing on the matter under N.C. Gen. Stat. § 131E-185, although the agency believed it was not legally required to do so. Wake Radiology submitted public comment opposing the application.

¶ 18 On 7 January 2020, the agency approved Bone and Joint's application. Wake Radiology timely filed a contested case petition in the Office of Administrative Hearings. An ALJ rejected Wake Radiology's argument and entered summary judgment for the agency, determining that the agency had the authority to issue the CON under either N.C. Gen. Stat. § 131E-176(16)(b) as an "expansion of use" or N.C. Gen. Stat. § 131E-176(16)(e) as a "change in project" for a "new institutional health service." Wake Radiology timely appealed the ALJ's decision to this Court.

Analysis

¶ 19 The parties in this case concede that there are no genuine issues of material fact and Wake Radiology's arguments on appeal all assert that the ALJ made errors of law. We review the agency's determination of these legal questions, at the summary judgment stage, under a *de novo* standard of review. *Blue Ridge Healthcare Hosps. Inc. v. North Carolina Dep't of Health & Hum. Servs.*, 255 N.C. App. 451, 456, 808 S.E.2d 271, 274 (2017); N.C. Gen. Stat. § 150B-51(b).

¶ 20 We begin with the ALJ's determination that the agency had the authority to expand the scope of use for Bone and Joint's MRI scanner through a CON under N.C. Gen. Stat. § 131E-176(16)(e). Wake Radiology concedes that, if Bone and Joint's application falls under this statutory provision, the agency was permitted to issue a CON with the expanded scope of use—essentially a modification of the earlier CON—without a traditional need determination or competitive review process. But Wake Radiology argues that this statutory provision does not apply, and that the General Assembly could not have intended for this provision to apply, in a case like this one. We therefore begin our analysis by examining

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N.C. Gen. Stat. § 131E-176(16)(e) and its place in this complex series of statutes governing certificates of need.

¶ 21 In North Carolina, health care providers cannot acquire or replace most of their medical equipment and facilities without permission from State regulators. That permission comes in the form of a certificate of need awarded by the State. The General Statutes provide that no person “shall offer or develop a new institutional health service without first obtaining a certificate of need” from the Department of Health and Human Services. N.C. Gen. Stat. § 131E-178(a).

¶ 22 Accompanying this provision is a lengthy definitional statute identifying the types of medical facilities and equipment that are considered “new institutional health services.” N.C. Gen. Stat. § 131E-176(16). Among those definitions is subsection (16)(e), which provides that a “new institutional health service” includes a “change in a project” proposed “within one year after the project was completed” if the change is “the addition of a health service” located at the facility developed during the project:

The following definitions apply in this Article:

...

(16) New institutional health services. – Any of the following:

...

e. A change in a project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

N.C. Gen. Stat. § 131E-176(16)(e).

¶ 23 The agency, and the ALJ, determined that Bone and Joint’s application fell within this statutory language because Bone and Joint applied for the CON within one year after the demonstration project for its existing MRI ended and Bone and Joint requested a change to provide

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additional health services at the diagnostic center established through its initial CON.

¶ 24 Wake Radiology argues that this determination is wrong for several reasons. First, it argues that Section 131E-176(16)(e) does not apply because the change to the CON was not proposed within one year after the “project” was completed. In May 2019, the State Health Coordinating Council ended the demonstration project for Bone and Joint’s MRI scanner, with the Governor’s approval, and moved that MRI machine from the demonstration project category to the general inventory category in the State Medical Facilities Plan. Within one year of that action, Bone and Joint applied for the broader CON for its 3.0T MRI scanner.

¶ 25 But Wake Radiology contends that “the project for which the 2007 CON was issued was for a fixed extremity MRI scanner, and that ‘project’ was completed long before 2019.” Specifically, it argues that the “project” referenced in the statutory provision ended either when Bone and Joint acquired the MRI scanner in 2007 or, at the latest, when the three-year data collection and reporting period described in the CON expired in 2010. This is so, Wake Radiology argues, because the State Health Coordinating Council’s decision “to end the project twelve years after it started in 2007, and several years after its completion, does not change the completion date of the project to 2019.” The State Health Coordinating Council, in Wake Radiology’s view, “is essentially an advisory body created by executive order” and its decisions are “irrelevant” to the legal question of when a project ends under the CON statutes.

¶ 26 We are not persuaded by Wake Radiology’s argument. When the language of a statute is clear and unambiguous, courts must construe the statute using its plain meaning. *Total Renal Care of North Carolina, LLC v. North Carolina Dep’t of Health & Hum. Servs.*, 242 N.C. App. 666, 672, 776 S.E.2d 322, 326 (2015). “When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning.” *Krishnan v. North Carolina Dep’t of Health & Hum. Servs.*, 274 N.C. App. 170, 172, 851 S.E.2d 431, 433 (2020).

¶ 27 The ordinary meaning of a “project” is “a specific plan or design” or “a planned undertaking: such as a definitely formulated piece of research.” *Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003). Here, Bone and Joint’s initial CON did not function like a typical CON for an MRI scanner. Ordinarily, when a provider obtains a CON for an MRI scanner, the “project” is the acquisition of the MRI scanner itself. Once the provider acquires the MRI scanner, it can offer any procedures it chooses.

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¶ 28 Bone and Joint's original CON was different. In 2006, the State Medical Facilities Plan included a need determination for a "demonstration project" for a fixed extremity MRI scanner in Wake County. Bone and Joint applied for a CON based on that need assessment and its original CON contained conditions that related to that demonstration project. For example, Bone and Joint could not perform "whole body scans" with its MRI; it was required to "conduct an organized research study" during its use of the MRI to assess "the convenience, costs effectiveness and improved access provided by a fixed extremity MRI scanner"; and it was required to "provide annual reports" about its research "for a 3-year reporting period from the date of installation." Thus, unlike a typical CON, in which the "project" is completed upon construction or acquisition of the facility or piece of equipment at issue, this project was ongoing—it was a "demonstration project" that State health experts used to assess the benefits of this type of limited-use, fixed extremity MRI scanner. That ongoing project continued until the same State health experts who created it (the State Health Coordinating Council, subject to approval by the Governor) decided to end it.

¶ 29 In short, applying the ordinary meaning of the word "project" to the circumstances surrounding this particular CON, we conclude that the "project was completed," as that phrase is used in N.C. Gen. Stat. § 131E-176(16)(e), when the State Health Coordinating Council chose to end the demonstration project, and corresponding research study, for Bone and Joint's MRI scanner.

¶ 30 Wake Radiology next argues that, even if Bone and Joint applied for the CON within one year after the project was completed, the new CON was not for "the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project." N.C. Gen. Stat. § 131E-176(16)(e). Specifically, Wake Radiology contends that "under no plausible interpretation could a demonstration project for an extremity MRI scanner be considered a 'facility' that was 'constructed or developed in the project.'"

¶ 31 This argument, too, ignores a key feature of Bone and Joint's CON. The initial CON expressly stated that its "scope" was for "a fixed extremity MRI scanner resulting in the establishment of a diagnostic center/ Wake County." In other words, the CON itself acknowledged that, once Bone and Joint acquired the limited-use MRI scanner, it necessarily created a "diagnostic center" wherever that MRI scanner was located. The term "health service facility" in the statute is defined to include a "diagnostic center." N.C. Gen. Stat. § 131E-176(9b). Thus, when the agency

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removed the limitations on the MRI scanner's use in the new CON, the effect was to permit Bone and Joint to add additional health services (the expanded functionality of its 3.0T MRI scanner) at a diagnostic center (the one expressly created in the CON through the acquisition of and use of the MRI scanner). We thus conclude that the new CON concerned "the addition of a health service that is to be located in the facility . . . that was . . . developed in the project." N.C. Gen. Stat. § 131E-176(16)(e).

¶ 32 Lastly, we address a policy argument that runs throughout Wake Radiology's challenge to the ALJ's decision. The argument, in essence, is that the agency's actions in this case would "interpret out of existence" a central feature of the CON laws: the notion that, before a new piece of medical equipment (say, a whole-body MRI scanner) is purchased in our State, there must be a need determination by State regulators and an opportunity for all the interested medical providers to apply for the right to acquire it. Those medical providers get to fight it out in a complicated regulatory process to see who comes out on top and gets the State's permission to acquire the machine.

¶ 33 So, the argument goes, applying the plain language of N.C. Gen. Stat. § 131E-176(16)(e) to this case creates a loophole in the usual process. Bone and Joint got a new, whole-body MRI scanner (which, to be fair, it already possessed, but with restrictions on use) without affording Wake Radiology and other providers who may want a new MRI machine the chance to compete for the right to acquire it instead.

¶ 34 There is a fatal flaw in this policy argument: The role of the courts is to interpret statutes as they are written. We cannot reject what is written to avoid a loophole that we, or the parties in a lawsuit, believe might undermine the legislature's policy goals. *Sykes v. Vixamar*, 266 N.C. App. 130, 138, 830 S.E.2d 669, 675 (2019). This is particularly true for a complicated regulatory regime like our State's certificate of need laws—a regime that has spawned a legion of lawyers and other experts who learn to navigate the intricate language chosen by our General Assembly. The role of the judicial branch is not to speculate about the consequences of the language the legislature chose; we interpret that language according to its plain meaning and "if the result is unintended, the legislature will clarify the statute." *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 287, 791 S.E.2d 906, 911 (2016).

¶ 35 Accordingly, we hold that the agency had the legal authority to issue the challenged CON to Bone and Joint. That CON was authorized by N.C. Gen. Stat. § 131E-176(16)(e) because Bone and Joint sought a

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“change in a project that was subject to certificate of need review and for which a certificate of need was issued,” the change was proposed “within one year after the project was completed,” and the change concerned “the addition of a health service that is to be located in the facility . . . that was . . . developed in the project.” *Id.* Because we conclude that the ALJ’s decision on this ground was correct, we need not address Wake Radiology’s challenges to the ALJ’s alternative grounds to uphold the agency decision.

Conclusion

¶ 36

We affirm the final decision.

AFFIRMED.

Judges COLLINS and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 OCTOBER 2021)

IN RE J.D.F. 2021-NCCOA-300 No. 20-371	Iredell (19JB44)	Vacated and Remanded
BLACKWELL v. BLACKWELL 2021-NCCOA-537 No. 20-710	Iredell (17CVD391)	Affirmed in part, Vacated in part and Remanded
CAPPS v. CUMBERLAND CNTY. BD. OF EDUC. 2021-NCCOA-538 No. 20-519	Cumberland (19CVS152)	Reversed
GAINNEY v. OLSON 2021-NCCOA-539 No. 20-640	Wake (16CVD3067)	Affirmed
IN RE A.L. 2021-NCCOA-540 No. 21-227	Robeson (20JA166)	Vacated and Remanded
IN RE B.J. 2021-NCCOA-541 No. 21-136	Cumberland (19JA5)	Affirmed
IN RE P.C. 2021-NCCOA-542 No. 21-161	Rowan (20JA46-48)	AFFIRMED IN PART, REMANDED IN PART.
LEHN v. LEHN 2021-NCCOA-543 No. 20-639	New Hanover (16CVD4146)	Affirmed
MacGREGOR v. SPRUNG 2021-NCCOA-544 No. 21-59	Wake (19CVS3269)	Dismissed
MILONE & MacBROOM, INC. v. CORKUM 2021-NCCOA-545 No. 20-922	Wake (18CVS13036)	Vacated
SPAHR v. SPAHR 2021-NCCOA-546 No. 20-570	Wake (13CVD3440)	VACATED AND REMANDED; NEW TRIAL

STATE v. ALSTON 2021-NCCOA-547 No. 20-691	Wake (16CRS220542)	No Error
STATE v. ARTHUR 2021-NCCOA-548 No. 20-635	New Hanover (19CRS1877) (19CRS50630-32)	No Error
STATE v. BLACKMON 2021-NCCOA-549 No. 20-801	Mecklenburg (18CRS236708)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. CORBETT 2021-NCCOA-550 No. 20-155	New Hanover (17CRS52176)	No Error
STATE v. COX 2021-NCCOA-551 No. 20-678	Union (19CRS50151)	No Error
STATE v. HOLLIDAY 2021-NCCOA-552 No. 20-768	Forsyth (19CRS61945) (19CRS61946)	Dismissed
STATE v. LANCASTER 2021-NCCOA-553 No. 20-727	Craven (17CRS52632-33) (18CRS151)	No Error
STATE v. McCONNEAUGHEY 2021-NCCOA-554 No. 20-467	Cleveland (17CRS52463)	Dismissed
STATE v. REDD 2021-NCCOA-555 No. 20-684	Pitt (03CRS64482)	VACATED AND REMANDED FOR RESENTENCING.
TAYLOR v. BANK OF AM., N.A. 2021-NCCOA-556 No. 20-160-2	Mecklenburg (18CVS8266)	Reversed and Remanded
WARREN v. GEMZIK 2021-NCCOA-557 No. 21-48	Halifax (13CVD237)	Affirmed

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ABUSE OF PROCESS

Sufficiency of pleadings—improper acts—ulterior motive—criminal charges against policemen—withholding exculpatory evidence—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs' lawsuit against a city official and other police officers (defendants) improperly dismissed plaintiffs' abuse of process claim. Plaintiffs sufficiently pleaded improper acts by defendants occurring after plaintiffs' criminal prosecution began and sufficiently pleaded that defendants "acted with an ulterior motive" by withholding exculpatory evidence on plaintiffs' charges in order to pressure them into leaving the police department. **Fox v. City of Greensboro, 301.**

ADMINISTRATIVE LAW

Judicial review—service of petition—motion for extension of time—good cause—Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable decision to the superior court, the superior court did not abuse its discretion by denying Aetna's motion for an extension of time to serve its petition for judicial review upon DHHS and the other parties after Aetna had failed to perform service within the mandatory 10-day period following the filing of its petition (pursuant to N.C.G.S. § 150B-46). The superior court's good-cause evaluation was supported by reason and was not arbitrary. **Aetna Better Health of N.C., Inc. v. N.C. Dep't of Health & Hum. Servs., 261.**

Judicial review—service requirement—mandated by statute—subject matter jurisdiction—Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable decision to the superior court, the superior court did not err by dismissing Aetna's petition for judicial review for lack of subject matter jurisdiction. Aetna's failure to timely serve DHHS and the other parties within the 10 days after the petition was filed, as required by N.C.G.S. § 150B-46, warranted dismissal, and Aetna's filing of an amended petition for judicial review could not circumvent the mandatory 10-day service requirement. **Aetna Better Health of N.C., Inc. v. N.C. Dep't of Health & Hum. Servs., 261.**

APPEAL AND ERROR

Appeal from custody order—motion to dismiss—Appellate Rule violations—A father's motion to dismiss the mother's appeal from a permanent custody order was denied. The mother could not have violated Appellate Rule 7(a)(1), as the father asserted, because that subsection was deleted from the Rules in 2017. Although the mother did violate Rule 28(b)(6) by failing to state the applicable standard of review for some of the issues she raised in her brief, the Court of Appeals chose to hear the appeal because the Rule violation did not impair its ability to review the mother's arguments. **Waly v. Alkamary, 73.**

Criminal case—request for jury instruction—self-defense—invited error—waiver of appellate review—In a prosecution for assault on a female and other charges arising from an altercation between defendant and his child's mother, the trial court did not err by denying defendant's request for a jury instruction on self-

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defense—which he made right before the court was about to instruct the jury—where defendant failed to file a pre-trial notice to assert self-defense (as required under N.C.G.S. § 15A-905(c)(1)) and expressly agreed to the court's instructions both before and after they were given. Rather, defendant's failure to object to the tendered instructions constituted invited error that waived his right to appellate review, including plain error review. Furthermore, given the overwhelming evidence of his guilt, defendant could not show that his denied request had prejudiced him. **State v. Hooper, 451.**

Denial of motion to suppress—failure to preserve right to appeal—by no fault of defendant—After pleading guilty to charges of drug trafficking and possession of a firearm by a felon, defendant failed to preserve his appeal from the denial of his motion to suppress where the plea transcript did not include a statement by defendant reserving the right to appeal the trial court's judgment. However, because defendant had lost his right to appeal through no fault of his own but rather due to his trial counsel's failure to give proper notice of appeal, defendant's appeal was reviewed by certiorari. **State v. Robinson, 643.**

Interlocutory appeal—granted motion to dismiss for lack of personal jurisdiction—In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, plaintiff's interlocutory appeal from an order granting defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction was immediately appealable under N.C.G.S. § 1-277(b) and because motions to dismiss for lack of personal jurisdiction affect a substantial right. **Cohen v. Cont'l Motors, Inc., 123.**

Interlocutory appeal—motion to transfer—three-judge panel—facial constitutional challenge—In an action asserting claims for alienation of affection and criminal conversation (together, "covenant claims"), and intentional and negligent infliction of emotional distress, defendant's appeal from an order denying his motion to transfer the case per Civil Procedure Rule 42(b)(4) for a three-judge panel to review his facial constitutional challenge to N.C.G.S. § 52-13 (codifying the covenant claims as actionable) was dismissed as interlocutory. Although the denial of a motion to transfer may be immediately appealable as affecting a substantial right, here, defendant could not show he was deprived of a substantial right where statutory mandatory transfer rules did not apply because not all issues unrelated to the constitutional challenge had yet been resolved. Further, nothing prevented defendant from raising the constitutional challenge before a three-judge panel if the covenant claims survived summary judgment. **Hull v. Brown, 570.**

Interlocutory order—substantial right—defense of absolute privilege—In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, the trial court's interlocutory order granting summary judgment to plaintiffs on defendants' affirmative defenses—including absolute privilege regarding the allegedly defamatory statements that were made in a quasi-judicial proceeding—was immediately appealable because the denial of immunity under the absolute privilege claim affected a substantial right. **Bouvier v. Porter, 528.**

Interlocutory order—substantial right—First Amendment violation—ecclesiastical abstention doctrine—In a lawsuit arising from an employment dispute between a church and one of its former pastors, in which the pastor filed a counterclaim against the church and a third-party complaint against a group of church elders, the church and the elders (appellants) were entitled to immediate review of their appeal from an interlocutory order denying their motion to dismiss the pastor's

APPEAL AND ERROR—Continued

claims and granting the pastor's motion to amend his pleadings. The challenged order affected a substantial right where appellants argued that, to resolve the pastor's claims, the court would have to interpret religious matters in violation of the ecclesiastical abstention doctrine stemming from the First Amendment. **Nation Ford Baptist Church Inc. v. Davis**, 599.

Interlocutory orders—substantial right—res judicata—paternity—In a child support case in which the issue of paternity was raised, the appellate court invoked Appellate Rule 2 to consider the Child Support Enforcement Agency's argument raised in its reply brief that the interlocutory order continuing hearing of a "Motion to Modify/Order to Show Cause" affected a substantial right, in that the issue of paternity had previously been adjudicated. The appellate court elected to consider the merits of the appeal in order to prevent manifest injustice. **Guilford Cnty. v. Mabe**, 561.

Interlocutory orders—writ of certiorari—serious question that might escape review—The appellate court invoked Appellate Rule 2 and issued a writ of certiorari pursuant to Appellate Rule 21 to review an interlocutory order that was not entitled to immediate appeal but that raised a serious question, regarding the trial court's exercise of jurisdiction in supplemental proceedings, that might otherwise escape review. **Milone & MacBroom, Inc. v. Corkum**, 576.

Preservation of issues—closing argument in medical malpractice trial—no objection—In a bifurcated medical malpractice case, where plaintiff did not object to defendants' closing argument regarding video surveillance of her that they introduced during the liability phase, she did not preserve for appeal her argument that defendants improperly suggested that the video had been introduced for substantive, and not for impeachment, purposes. **Hill v. Boone**, 335.

Preservation of issues—fatal variance between indictment and evidence—motion to dismiss based on sufficiency of evidence—In a drug prosecution, without deciding whether defendant's motion to dismiss for insufficient evidence was adequate to preserve for appellate review his argument that a fatal variance existed between the indictment that charged defendant with resisting a public officer and the evidence presented, the Court of Appeals employed de novo rather than plain error review to resolve the fatal variance issue. **State v. Tarlton**, 249.

Preservation of issues—statutory right to confront witnesses—probation revocation hearing—objection—insufficient—At a probation revocation hearing, where a law enforcement officer with no personal knowledge of the case testified to the contents of notes written by defendant's probation officer, defendant failed to preserve for appellate review his argument that the trial court violated his statutory right to confront witnesses (N.C.G.S. § 15A-1345(e)), despite objecting to the testimony, because he did not specify the statutory violation as the grounds for his objection, nor were such grounds apparent from context where defendant did not request his probation officer to appear at the hearing. Further, because defendant failed to properly invoke his confrontation rights, defendant's contention that the issue was preserved because the court violated a statutory mandate lacked merit. **State v. Thorne**, 655.

Preservation of issues—traffic stop—drug seizure—meritorious argument—The Court of Appeals invoked Appellate Rule 2 to review defendant's constitutional challenge to the seizure of drugs from his pants pocket after he was pulled over for a seatbelt violation because, in the event he did not properly preserve the issue

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for appeal, he presented a meritorious argument that required review in order to prevent manifest injustice. **State v. Johnson, 475.**

Remand from Supreme Court—higher court's interpretation of evidence—same or less taxing standard—On remand from the Supreme Court to consider the remaining issues in defendant's appeal—whether the trial court committed plain error in allowing certain testimony and in its jury instructions—the Court of Appeals held that, assuming arguendo the trial court erred, the alleged errors did not amount to plain error because the Supreme Court, in its opinion considering a different argument raised by defendant, evaluated the strength of the evidence in the case while applying a less taxing standard of review and concluded that, in light of the virtually uncontested evidence of defendant's guilt (not relying upon the evidence that defendant challenged in the case before the Court of Appeals), defendant could not meet his burden. **State v. Goins, 448.**

Rule 58—child custody action—motion to stay proceedings—oral ruling not put in writing—In an appeal from a permanent custody order, the Court of Appeals lacked jurisdiction to review the mother's argument that the trial court should have stayed the custody proceeding based on North Carolina being an inconvenient forum. Even if the mother's pro se letter to the district court clerk's office had qualified as a proper motion to stay under Civil Procedure Rule 7(b), the trial court never entered a written order memorializing its oral ruling (denying the motion), as required under Rule 58. **Waly v. Alkamary, 73.**

Standard of review—bifurcated trial—medical malpractice—admission of evidence during liability phase—In an appeal challenging the admission of evidence—video surveillance footage—related to compensatory damages during the liability portion of a bifurcated medical malpractice trial, the Court of Appeals applied a de novo standard to first determine whether the video was relevant for impeachment purposes and whether it was properly authenticated. Although the court would have employed an abuse of discretion standard to determine whether the evidence should have been excluded under Evidence Rule 403, plaintiff abandoned that issue by failing to argue it on appeal. **Hill v. Boone, 335.**

ATTORNEY FEES

Civil contempt order—vacated—no legal basis for attorney fees—Where the trial court's order holding a father in civil contempt for willful violation of a child custody and support consent order was vacated because the consent order was ambiguous as to the relevant issue (summer vacation), the portion of the order awarding attorney fees to the mother was also vacated because there was no legal basis for an award of attorney fees. This case did not present one of the limited situations in which attorney fees could still be awarded even though the alleged contemnor could not be held in contempt at the time of the hearing. **Walter v. Walter, 61.**

Criminal case—civil judgment—notice and opportunity to be heard—The trial court's order requiring defendant to pay attorney fees after he pleaded guilty to multiple drug offenses was vacated and the matter remanded for further proceedings where the court did not personally ask defendant if he wanted to be heard on the issue of attorney fees. **State v. France, 436.**

Subject matter jurisdiction—fees awarded after appeal of underlying matter—child custody proceeding—award not dependent upon outcome—After

ATTORNEY FEES—Continued

finding a father in civil contempt for violating a child custody order, the trial court retained jurisdiction to award attorney fees pursuant to N.C.G.S. § 50-13.6 to the mother—even after the father's appeal of the contempt order had been filed and perfected—because the attorney fees award was not dependent upon the outcome of the contempt proceeding, as the award was based on the statutory findings that the mother was an interested party who acted in good faith and lacked sufficient means to defray the costs of litigation. **Blanchard v. Blanchard**, 269.

ATTORNEYS

Legal malpractice—failure to notarize mediated settlement—enforceability—genuine issue of material fact—In plaintiff's legal malpractice suit filed against his attorneys after his ex-wife successfully challenged a property settlement, the trial court improperly granted summary judgment to the attorneys after determining that their mistakes—after mediation, the attorneys presented stipulations to the trial court that had not been notarized and did not attach a chart of the assets to be distributed—could not have been the proximate cause of any harm to plaintiff. There was a genuine issue of material fact regarding whether the stipulations would have been enforceable if they had been notarized, since they appeared to contain all material and essential terms, making them binding if properly filed. **Podrebarac v. Horack, Talley, Pharr & Lowndes, P.A.**, 624.

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning order—constitutionally protected status as parent—sufficiency of findings—In a neglect and dependency case, the trial court's permanency planning order awarding guardianship to the children's grandfather was affirmed where the court's factual findings supported its conclusion that the mother acted in a manner inconsistent with her constitutionally protected status as a parent and where, contrary to the mother's argument, the court was not required to find that she had done so willfully. The court found that the children's neglect adjudication was based on their exposure to their brother's death, which resulted from abuse in the home by the mother's boyfriend; the mother avoided taking one of her children to the doctor so the department of social services would not discover the child's burn wounds, which were also allegedly caused by the boyfriend; and the mother failed to comply with multiple aspects of her case plan, including participation in therapy and domestic violence services. **In re J.R.**, 352.

Permanency planning order—eliminating reunification—appeal—premature—A mother's appeal from a permanency planning order ceasing reunification efforts with her daughter was dismissed without prejudice because the appeal was premature under the provisions of N.C.G.S. § 7B-1001(a)(5)(a). Although the mother properly filed written notice preserving her right to appeal the order, pursuant to subsection (a)(5)(a)(1), she filed her notice of appeal from the order before the sixty-five-day period required by subsection (a)(5)(a)(2) had elapsed. **In re A.L.**, 168.

Permanency planning—cessation of reunification efforts—sufficiency of evidence—In a neglect and dependency case, the trial court properly ceased reunification efforts with the children's mother where competent evidence showed that such efforts would be unsuccessful or inconsistent with the children's health or safety. Specifically, the mother was not making adequate progress in her family services case plan where she refused to participate in recommended therapy, failed to engage in domestic violence services, and failed to secure proper housing. The

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

circumstances leading to the children's neglect adjudication further supported a cessation of reunification efforts, where the children's younger brother died as a result of abuse in the home by the mother's boyfriend and where the mother had previously concealed the boy's injuries resulting from that abuse from the department of social services. **In re J.R.**, 352.

Permanency planning—guardianship—verification—guardian's understanding of legal significance of appointment—In a neglect and dependency case, the trial court's permanency planning order awarding guardianship to the children's grandfather was affirmed where the court properly verified—as required under N.C.G.S. §§ 7B-600(c) and 7B-906.1(j)—that the grandfather understood the legal significance of guardianship. Competent evidence at the permanency planning hearing supported the court's verification, including the court's thorough colloquy with the grandfather, the grandfather's testimony, and evidence from a social worker and the guardian ad litem showing that the grandfather had taken good care of the children during the year that they lived with him. **In re J.R.**, 352.

CHILD CUSTODY AND SUPPORT

Contempt motion—seeking civil and criminal contempt—notice of alleged contemptuous actions—hearing on civil contempt—Where a mother's contempt motion alleging that her children's father had willfully violated the parties' custody order sought to hold the father in both civil and criminal contempt, the Court of Appeals did not need to address whether the father's due process rights were violated by lack of notice of the nature of the contempt charges, because the father had proper notice of his alleged contemptuous actions and the trial court considered only civil contempt at the hearing. **Blanchard v. Blanchard**, 280.

Contempt order—purge conditions—allowing the mother phone or video access to the children—Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and ensure that the children's iPad was able to connect to calls with the mother (or allow his own phone to be used for the calls), and giving him time to purge the contempt in order to avoid incarceration—were proper and affirmed by the appellate court. The father's arguments to the contrary were meritless. **Blanchard v. Blanchard**, 280.

Contempt order—purge conditions—not modification of custody order—Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and communicate with her to arrange the calls with the children—did not improperly modify the parties' custody order. While the custody order did not set out exact times and methods for the telephone or video communication between the parties and the children, the purge conditions were consistent with the custody order and applied only until the father had purged the contempt. **Blanchard v. Blanchard**, 280.

Custody order—violation—reasonable telephone or video access to children—bad faith—The trial court's order holding a father in civil contempt for willful violation of a custody order was properly supported by the evidence and factual findings where the custody order required the father to provide daily unrestricted

CHILD CUSTODY AND SUPPORT—Continued

and reasonable telephone or video contact with the children to the mother while the children were visiting him, yet the father blocked the mother on his cell phone and arbitrarily chose to turn on the children's iPad each evening from 6:00 p.m. to 6:30 p.m. without informing the mother that she should call during that time period. **Blanchard v. Blanchard**, 280.

Jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—parties left the State after initial custody determination—The trial court had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to enter a permanent custody order in a custody action where, after the court entered the first temporary custody order, the parties relocated out of North Carolina. Based on UCCJEA's provisions, the action “commenced” in North Carolina, which had been the child's “home state” for over six months before the father filed his complaint, and the “initial child custody determination” also occurred in North Carolina; thus, the North Carolina court retained its “initial determination” jurisdiction even after the parties left the state. **Waly v. Alkamary**, 73.

CHILD VISITATION

Custody action—domestic violence protective order against father—no-contact provision—interference with visitation rights—In a child custody action filed in North Carolina, where the mother later moved to New Jersey and obtained a domestic violence protective order (DVPO) there against the father, the trial court did not improperly use the New Jersey DVPO against the mother when changing primary custody to the father. Evidence supported the court's findings that the mother used the DVPO's no-contact provision to make it harder for the father to coordinate visits with their child. The court also gave the parties a chance to seek clarification from the New Jersey court regarding the no-contact provision before issuing its custody ruling, thereby trying to respect the DVPO's terms. Additionally, the order granting primary custody to the father, which required the parties to communicate indirectly through a secure online application, complied with the DVPO, which deferred to the terms of the father's visitation as ordered in the North Carolina action. **Waly v. Alkamary**, 73.

Denied—best interests of child—findings and evidence—unwillingness to obey court orders—The trial court did not err by denying a mother visitation with her minor daughter where the trial court's conclusion that visitation with the mother was not in the daughter's best interests was supported by the findings of fact, which were supported by substantial evidence (even after excluding findings that were not supported by the evidence)—including that the mother showed she was unwilling to obey the orders of the trial court, she had a history of running from authorities and concealing her child, she had caused significant disruptions during visits with her daughter, and she had homicidal and suicidal thoughts. **Isom v. Duncan**, 171.

Father's visitation—facilitation by mother's sister—finding of fact—sufficiency of evidence—In a child custody action, where the mother had secured a domestic violence protective order (in another state) against the father and therefore placed her sister in charge of coordinating the father's visits with the child, competent evidence supported the trial court's finding that the sister did not want to facilitate the father's visitation and that—given her tendency to unilaterally change the times for phone visits, leaving the father with no alternate means to contact his child—she was no longer the right person to coordinate the visits. **Waly v. Alkamary**, 73.

CHILD VISITATION—Continued

Father's visitation—lack of compliance by mother—sufficiency of evidence—In a child custody action, where the trial court granted primary custody to the father after having originally given him secondary custody with visitation in a temporary order, competent evidence supported the court's finding that the mother had no interest in fostering a relationship between the father and their daughter and that she had repeatedly violated prior visitation orders—despite numerous requests and contempt motions filed against her—by refusing to let the father visit or speak to the child. **Waly v. Alkamary, 73.**

Frequency and duration—failure to specify—limited discretion given to parties—In a neglect and dependency case, where the trial court ceased reunification efforts with the mother and awarded guardianship to the children's grandfather, the court's order providing for the mother's visitation with the children was reversed and remanded where the court failed to specify the minimum frequency and duration of the mother's visits, as required under N.C.G.S. § 7B-905.1(c). Although the order stated that the mother would have supervised visitation for "a minimum of four hours per month," it was unclear whether this provision required a minimum of one visit of four hours per month or multiple shorter visits totaling four hours per month. However, the court did not improperly delegate its judicial authority by leaving the day and time of each visit to be agreed upon by the mother and the grandfather. **In re J.R., 352.**

CHURCHES AND RELIGION

Subject matter jurisdiction—ecclesiastical abstention doctrine—termination of pastor's employment—In a lawsuit arising from an employment dispute between a church and one of its former pastors, the ecclesiastical entanglement doctrine of the First Amendment did not bar the trial court from reviewing the pastor's counterclaim against the church and third-party complaint against a group of church elders, where the court could resolve the first determinative issue—whether the elders' procedure for firing the pastor violated the church's then-controlling bylaws—by applying neutral principles of law. Although the second determinative issue—whether the elders properly found the pastor was unfit to serve as the church's senior pastor—would require the court to impermissibly engage with ecclesiastical matters, there was no guarantee that the court would have to reach that second issue, which depended on how it resolved the first issue. **Nation Ford Baptist Church Inc. v. Davis, 599.**

CIVIL RIGHTS

42 U.S.C. § 1983—equal protection—sexual assault of student by bus driver—sufficiency of allegations—Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their equal protection claim (pursuant to 42 U.S.C. § 1983) against the school board where there were no factual allegations that the student was treated differently on the basis of her gender and where the student's disability did not afford her special protection under the Equal Protection Clause. **Osborne v. Yadkin Valley Econ. Dev. Dist., Inc., 197.**

42 U.S.C. § 1983—sexual assault of student by bus driver—failure to train and supervise—Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the

CIVIL RIGHTS—Continued

school board—did not plead sufficient facts to support their equal protection claim (pursuant to 42 U.S.C. § 1983) that the school board failed to properly train and supervise the bus driver who committed the assaults. There were no factual allegations that there were similar prior incidents, that the board showed a deliberate indifference that led to the assaults, or that the board had actual or constructive knowledge that the bus driver posed a risk to the student. **Osborne v. Yadkin Valley Econ. Dev. Dist., Inc.**, 197.

42 U.S.C. § 1983—substantive due process—sexual assault of student by bus driver—sufficiency of allegations—Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their substantive due process claim (pursuant to 42 U.S.C. § 1983) that the school board deprived the student of bodily integrity where there were no factual allegations that the board intentionally acted to increase the risk of danger to the student. **Osborne v. Yadkin Valley Econ. Dev. Dist., Inc.**, 197.

Title IX claim—sexual assault of female student by bus driver—no actual knowledge by school board—There was no genuine issue of material fact regarding the Title IX discrimination claim brought against a school board by the parents of a special-needs student who was sexually assaulted by her bus driver—who worked for the independent contractor hired by the school board—where no school board member or school employee had any actual knowledge that the student had been assaulted until after the bus driver was arrested and fired. **Osborne v. Yadkin Valley Econ. Dev. Dist., Inc.**, 197.

CONSPIRACY

Civil—conspiracy to provide false information—criminal charges against policemen—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs' lawsuit against a city official and other police officers (defendants) properly dismissed plaintiffs' civil conspiracy claim, where plaintiffs accused defendants of agreeing to provide false information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges. North Carolina law does not recognize a cause of action for civil conspiracy to provide false statements in order to secure someone's arrest. Moreover, plaintiffs failed to allege specific facts regarding how or when defendants agreed to the purported conspiracy. **Fox v. City of Greensboro**, 301.

CONSTITUTIONAL LAW

Effective assistance of counsel—direct appeal—dismissed without prejudice—Defendant's ineffective assistance of counsel claim on direct appeal from his conviction for robbery with a dangerous weapon was dismissed without prejudice where the cold record was insufficient for the appellate court to determine whether counsel's performance in failing to challenge a photographic lineup was deficient. **State v. McDougald**, 25.

North Carolina—due process—police officer terminated—right to continued employment—Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot

CONSTITUTIONAL LAW—Continued

himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant failed to state a claim that his employer, the City of Durham, had violated his state constitutional right to due process. Employees in the state of North Carolina generally do not have a property interest in continued employment, and the sergeant did not allege that any statute, ordinance, or contract created such an interest. **Mole' v. City of Durham, 583.**

North Carolina—equal protection—class of one—police officer terminated—Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant failed to state a claim that his employer, the City of Durham, had violated his state constitutional right to equal protection by subjecting him to disparate treatment as compared to similarly situated employees. This type of equal protection claim—a “class of one” claim—cannot be stated in the employment context. **Mole' v. City of Durham, 583.**

North Carolina—fruits of their own labor clause—police disciplinary process—failure to follow policy—Where a police sergeant was fired for keeping his promise to allow an armed suspect, who had barricaded himself in a bedroom and threatened to shoot himself, to smoke a marijuana cigarette after he surrendered to police, the sergeant adequately pled a claim that his employer, the City of Durham, had violated Article I, Section 1's “fruits of their own labor” clause, which applied to the disciplinary action taken against him. His complaint properly stated the claim by alleging that the City had violated its own policy, which was designed to further a legitimate government interest, by failing to give him the minimum 72 hours of notice of his pre-disciplinary conference and that he was thereby injured by having inadequate time to prepare his response. **Mole' v. City of Durham, 583.**

CONTEMPT

Willful violation of order—ambiguous terms—reasonable interpretation—The trial court erred by finding a father in civil contempt for willful violation of a child custody and support consent order where the consent order was ambiguous as to the relevant issue (summer vacation), such that the father's interpretation of the ambiguous provisions was reasonable. **Walter v. Walter, 61.**

CRIMES, OTHER

Intimidating a witness—variance between indictment and evidence—not fatal—In an assault trial where defendant was also charged with intimidating a witness, there was no fatal variance between the indictment for the intimidating charge and the State's evidence where the variance did not affect an essential element of the offense and was therefore mere surplusage. Although the indictment alleged that defendant told a third person to tell a witness that defendant would have the witness deported if he testified about the assault, but there was no evidence that defendant told the third person to convey the message to the witness or that the witness received the message, the gist of the offense involved obstruction of justice and did not require the witness to actually receive the intimidating message. **State v. Clagon, 425.**

CRIMINAL LAW

Denial of motion to suppress—Anders review—no issues of arguable merit—

After defendant pleaded guilty to charges of drug trafficking and possession of a firearm by a felon, the trial court's judgment was upheld on appeal where defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), raising four legal issues that, ultimately, lacked arguable merit. Specifically, the indictments against defendant were sufficient to confer jurisdiction upon the trial court; the trial court properly denied defendant's motion to suppress evidence from law enforcement's search of his home because competent evidence showed that the officers did not act in bad faith by turning off their body-worn cameras and that no exculpatory evidence was lost; a sufficient factual basis existed for defendant's guilty plea; and the trial court properly sentenced defendant within the statutory guidelines. **State v. Robinson, 643.**

Jury instructions—intimidating a witness—"attempted to deter"—

There was no error in the trial court's jury instruction—on the charge of intimidating a witness—that defendant "attempted to deter" a witness from testifying against defendant in an assault case, because that phrase was not a deviation from the pattern jury instructions and, even if it was, defendant failed to show it likely misled the jury in light of the entirety of the instructions. **State v. Clagon, 425.**

Jury instructions—robbery with a dangerous weapon—no designation of victims named in indictment—

The trial court did not err, much less commit plain error, by instructing the jury on the elements of robbery with a dangerous weapon without naming the two individuals listed in the indictment as the alleged victims. The evidence supported the elements of the offense with regard to at least one of the two named victims, both of whom testified at trial and identified defendant in court, and did not support a verdict of guilty to robbery with a firearm with regard to any other person who defendant interacted with during his crime spree. **State v. McLymore, 34.**

Motion for mistrial—testimony that defendant's photo came from jail archives—prejudice analysis—curative jury instruction—

The trial court did not abuse its discretion by denying defendant's motion for a mistrial after a jury found defendant guilty of robbery with a dangerous weapon. Defendant was not prejudiced by a detective's testimony that photos of defendant used in a photographic lineup came from "jail archives," since the testimony was not specific and did not amount to evidence that defendant had committed another crime. Moreover, any error was cured by the trial court's immediate instruction to the jury to disregard the detective's statement. **State v. McDougald, 25.**

Prosecutor's closing arguments—victim's blood the source of DNA in defendant's car—reasonable inference—

In a first-degree murder trial, the prosecutor's statements that DNA found in defendant's car came from the victim's blood were based on reasonable inferences from the evidence regarding blood and DNA that were recovered from the car, even if the evidence contained some discrepancies, which may have resulted from the use of chemical cleaners inside the car. **State v. Bradley, 389.**

Prosecutor's closing statements—about second missing woman being dead—reasonable inference—proper purpose—

In a trial for the first-degree murder of a woman, the prosecutor was properly allowed to state during closing that a second woman—whose disappearance led to an investigation that was closely intertwined with the victim's—was dead. A pretrial ruling that limited how the State could refer to the status of the second missing woman, whose body had not been found, was

CRIMINAL LAW—Continued

intended to prohibit any mention that defendant had been convicted of the second woman's death. Not only did evidence support a reasonable inference that the second missing woman was dead, but also the references to her at closing were for a proper purpose, including defendant's identity as the victim's killer, motive, and a common plan or scheme, which the trial court reinforced through a limiting instruction to the jury. **State v. Bradley, 389.**

Prosecutor's closing statements—presence of “evil”—race of defendant and victims visible on visual aid—In a first-degree murder trial, the prosecutor's statements during closing regarding the presence of “evil” were not so grossly improper as to require *ex mero motu* intervention by the trial court. Although defendant argued on appeal that the statements were particularly improper for occurring while the prosecutor displayed a posterboard to the jury with pictures of defendant, who is Black, and the victim and two other women who were involved with defendant, all of whom are white, the prosecutor made no references to race during closing, defendant had an opportunity to review the posterboard beforehand and had no objection to it being shown, and the jury had already observed the race of each person on the posterboard through evidence that was presented during trial. **State v. Bradley, 389.**

Prosecutor's closing statements—shifting burden to defendant—curative instruction—In a first-degree murder trial, defendant was not entitled to a mistrial after the prosecutor made statements during closing suggesting that defendant had the burden of proving his own innocence and that defendant was responsible for the inclusion of second-degree murder as a lesser-included offense on the verdict sheet. The trial court gave a curative instruction to the jury based on defendant's timely objection, and juries are presumed to follow a court's instructions. **State v. Bradley, 389.**

DAMAGES AND REMEDIES

Restitution—assault case—lack of supporting evidence—The trial court's order requiring defendant to pay restitution in the amount of \$23,189.22 to the victim in a trial for assault with a deadly weapon inflicting serious injury was vacated for lack of any evidence to support that amount and the matter was remanded for rehearing. **State v. Clagon, 425.**

DIVORCE

Equitable distribution—motion in the cause—before entry of absolute divorce judgment—On consolidated appeal from an order dismissing a wife's motions in the cause for equitable distribution in two separate cases, the appellate court held that the trial court erred by dismissing the wife's equitable distribution claim in the second case (initiated by an absolute divorce complaint filed by the husband) where the wife asserted her equitable distribution claim via a motion in the cause before entry of the absolute divorce judgment. **Bradford v. Bradford, 109.**

Equitable distribution—voluntary dismissal without prejudice—action terminated—On consolidated appeal from an order dismissing a wife's motions in the cause for equitable distribution in two separate cases, the appellate court held that the trial court properly dismissed the wife's equitable distribution claim in the first case (initiated by a custody complaint filed by the husband, to which the wife filed counterclaims, including for equitable distribution) because after all of the claims

DIVORCE—Continued

except for the wife's equitable distribution claim had been fully resolved or dismissed by the parties, the wife's voluntary dismissal without prejudice of the equitable distribution claim had the effect of terminating the action. Therefore, her equitable distribution claim could be reasserted only by timely commencing a new civil action or by asserting the claim in the other Chapter 50 action (for absolute divorce) pending between the parties. **Bradford v. Bradford, 109.**

DOMESTIC VIOLENCE

Protective order—sought by minors against step-parent—denied—no findings of fact—In a consolidated appeal from the denial of two minors' motions for a domestic violence protective order against their father's wife, where the trial court did not make any findings of fact, the orders were vacated and the matters remanded for entry of new orders with findings of fact and appropriate conclusions of law. **D.C. v. D.C., 371.**

EASEMENTS

Appurtenant—expressly created by deed—easement right restricted—benefit only to one tract—In an action to determine easement rights between owners of adjacent lots, an appurtenant easement expressly created by deed across one tract to benefit a second tract (to enable users of the second tract to access a public road) did not create an easement right to access or benefit any other land adjacent to those two tracts. **Gribble v. Bostian, 17.**

Appurtenant—expressly granted by deed—location left to later agreement—determination by court—evidentiary support—In an action to determine easement rights between owners of adjacent lots, there was ample evidence to support the trial court's findings of fact regarding the existence of an appurtenant easement, but not the location of the easement chosen by the court (in an area that neither party advocated for). Instead, the following evidence supported placing the easement along a dirt path: the deed conveying one portion of a property to defendant ("Tract 2," the dominant estate) expressly reserved a thirty-foot right-of-way across another portion of the property ("Tract 1," the servient estate) to enable users of Tract 2 to reach a public road; the deed left the location of the easement to be agreed upon later by the parties; at the time of the deed, there already existed a dirt path across Tract 1 which connected Tract 2 and the road; defendant's regular use of the dirt path for years after acquiring Tract 2 was acquiesced to by the owner of Tract 1; and no other portion of Tract 1 was used for ingress and egress by defendants. **Gribble v. Bostian, 17.**

Appurtenant—right-of-way to road—fence dispute between neighbors—In a dispute that arose when plaintiffs built a fence that blocked defendant, their neighbor, from using a right-of-way that straddled their respective properties, the trial court erred by concluding that the right-of-way was a public right-of-way owned by the city, where the undisputed facts did not support such a conclusion. The previous owners of the large tract that was sold and divided into multiple lots (some of which were purchased by plaintiffs and defendant) created the right-of-way as a private appurtenant easement for the benefit of the owners of the adjacent land (benefitting plaintiffs and defendant here), as evidenced by a recorded 1952 plat (filed in anticipation of the large tract's sale and showing the new right-of-way) and other documents filed contemporaneously. **Craig v. Neal, 148.**

EASEMENTS—Continued

Gates erected—gravel road across neighboring property—unreasonable interference—In a dispute between neighboring landowners, where plaintiffs erected gates across a portion of a gravel road on their property through which defendants had an easement, the trial court properly ordered plaintiffs to remove the gates because, although the gates were necessary to the plaintiffs' reasonable enjoyment of their agricultural land (by helping to contain plaintiffs' horses), they unreasonably interfered with defendants' easement rights (defendants had to open the gates by typing a code on a temperamental, inconveniently located keypad that sometimes locked defendants out, the gates malfunctioned in cold weather, and plaintiffs' horses sometimes blocked the gates). However, the portion of the court's judgment declaring that plaintiffs had no right at all to erect gates across the easement was modified to allow plaintiffs to erect gates provided that they did not unreasonably interfere with defendants' easement rights. **Taylor v. Hiatt, 506.**

ELECTIONS

Protest—defense of absolute privilege—applicability—quasi-judicial proceeding—In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, absolute privilege was available to defendants as an affirmative defense because statements made in an election protest to a county board of elections—which has statutory authority to conduct investigations into and make discretionary decisions about how elections are conducted—are statements made in the course of a quasi-judicial proceeding. **Bouvier v. Porter, 528.**

Protest—defense of absolute privilege—challenge to individual voters—relevance to protest—In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, although plaintiffs argued that absolute privilege was not available to defendants as an affirmative defense on the basis that defendants' allegedly defamatory statements regarding individual voters should have been classified as an untimely voter challenge rather than an election protest (each governed by different statutory provisions), the statements were sufficiently relevant to the subject matter of the controversy put before the elections boards to qualify for the privilege. **Bouvier v. Porter, 528.**

ENFORCEMENT OF JUDGMENTS

Full faith and credit—domestic violence protective order from another state—child custody action in North Carolina—In a child custody action filed in North Carolina, where the mother later moved to New Jersey and obtained a domestic violence protective order (DVPO) there against the father, the trial court properly gave full faith and credit to the New Jersey DVPO in its permanent custody order granting primary custody to the father. The order required the parties to communicate indirectly through a secure online application to coordinate visitation, and therefore it complied with the DVPO's no-contact provision prohibiting direct contact between the parties. Furthermore, the DVPO specifically deferred to the terms of the father's visitation as originally laid out in the court's prior custody order, which required the parties to communicate in some way to set up visits. **Waly v. Alkamary, 73.**

EVIDENCE

Authentication—screen shots of online video calls—no evidence—In a child custody action, the trial court did not err by declining to admit an exhibit showing screenshots of online video calls between the father and the mother's sister (regarding the father's visitation with the child). The mother failed to properly authenticate the exhibit where she merely described the screenshots as "a scribe between [the father] and my sister" without presenting any evidence that the screenshots were what she claimed them to be. **Waly v. Alkamary, 73.**

Authentication—video surveillance—cross-examination of person depicted in video—In a bifurcated medical malpractice trial brought by plaintiff after she had foot surgery, video surveillance of plaintiff introduced by defendants during the liability phase was not authenticated by typical means where defendants did not introduce testimony from the video's creator and instead cross-examined plaintiff to ask if she appeared in the video on various dates and times, which she confirmed. Although plaintiff's responses, without more, would have been insufficient, her admissions regarding depictions of her grandchild—including his age—in the video, which served to establish her health status during a relevant time period, constituted authentication of those portions such that they could be used for impeachment purposes. **Hill v. Boone, 335.**

Determination of easement rights—statements by deceased former property owner—Dead Man's Statute—waiver—In an action to determine easements rights between owners of adjacent lots, plaintiff waived application of the Dead Man's Statute where her counsel asked defendant repeatedly about conversations he had with the former (deceased) owner of both tracts. Further, statements by the former owner were properly admitted, not only pursuant to Evidence Rule 804 as statements from an unavailable witness, but also as statements against the former owner's pecuniary interests (since the former owner acquiesced to defendant's use of a dirt path, across his property in order to reach a public road, as an easement). **Gribble v. Bostian, 17.**

Introduced for impeachment purposes—limiting instruction not requested—In a bifurcated medical malpractice trial in which video surveillance of plaintiff was properly admitted during the liability phase for impeachment purposes, the trial court was not required to give a limiting instruction absent a request from plaintiff. **Hill v. Boone, 335.**

Murder trial—evidence of another missing person—Evidence Rule 403—probative value—In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, the trial court did not abuse its discretion by determining that, pursuant to Rule 403, evidence regarding the second woman was more probative than prejudicial because there was an obvious connection between the disappearances of both women, the investigations were closely intertwined, and the evidence demonstrated a common plan or scheme by defendant in targeting both women. **State v. Bradley, 389.**

Murder trial—evidence of another missing person—Evidence Rule 404(b)—cases intertwined—In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, there was no error in the admission of evidence regarding the second woman because the investigations into each woman's disappearance were temporally and factually interrelated, there were numerous similarities between both women, and nearly every trial witness had some connection to

EVIDENCE—Continued

both investigations. The evidence was properly admitted under Rule 404(b) to provide a complete development of the facts and to establish the weight and probative value of the State's evidence. **State v. Bradley, 389.**

Relevance—damages evidence introduced during liability phase—impeachment—In a bifurcated medical malpractice trial in which defendants introduced video surveillance of plaintiff during the liability phase, the video was properly admitted for impeachment purposes after plaintiff opened the door to her credibility by testifying about the nature of the pain she felt and the resulting physical limitations she suffered after she had foot surgery. **Hill v. Boone, 335.**

FALSE PRETENSE

“Person within this State”—corporate victim—sufficiency of evidence—In a prosecution for obtaining property by false pretenses, assuming without deciding that “person within this State” (pursuant to N.C.G.S. § 14-100, referring to a victim) is an essential element of the offense, the State nevertheless met this requirement by presenting evidence that the large quantity of cell phones defendant ordered from a corporation at a discount, on the pretense that the phones were for a non-existent charity, were shipped to one of the corporation's retail stores located in North Carolina and that one of the corporation's agents met with defendant's collaborator in various North Carolina locations. **State v. Pierce, 494.**

Valuation of property—to elevate felony—fair market value—sufficiency of evidence—In a prosecution for obtaining property by false pretenses in which defendant obtained a large quantity of cell phones at a discount on behalf of a non-existent charity with plans to resell the phones at the full retail value, the State presented substantial evidence, including actual fraud loss values, from which a jury could conclude that the value of the property obtained—meaning fair market value—was \$100,000.00 or more, elevating each of four counts to a Class C felony pursuant to N.C.G.S. § 14-100(a), regardless of any amount defendant may have paid when obtaining the phones. **State v. Pierce, 494.**

FIREARMS AND OTHER WEAPONS

Discharging into an occupied vehicle while in operation—“into property” element—toolbox in truck bed—There was sufficient evidence to convict defendant of discharging a firearm into an occupied vehicle while in operation, in violation of N.C.G.S. § 14-34.1(b), where the “into property” element was satisfied by a bullet fired from defendant's gun striking the toolbox that was attached inside the bed of the victim's truck, adjacent to the wall of the truck's passenger cabin. **State v. Staton, 57.**

HOMICIDE

Castle doctrine defense—questions of fact regarding applicability—for jury to decide—The trial court did not err by declining to adjudicate defendant's castle doctrine defense to her first-degree murder charge in a pretrial hearing, and defendant's argument that the castle doctrine statute's use of the word “immunity” meant that the issue had to be resolved by the judge rather than the jury was meritless. There were questions of fact regarding the applicability of the defense, and the trial court properly permitted the case to proceed to jury trial. **State v. Austin, 377.**

HOMICIDE—Continued

First-degree—premeditation and deliberation—sufficiency of evidence—In a first-degree murder trial, the State's evidence, though circumstantial, was sufficient to support a reasonable inference that defendant acted with premeditation and deliberation in killing the victim, given the brutal nature of the killing and the efforts undertaken to conceal the body and the crime. The victim died from four lacerations to her skull and internal epidural hemorrhaging from repeated blunt force trauma; she had numerous other wounds inflicted from either strangling or blunt force trauma; her body was found stripped, bound with duct tape, wrapped in black trash bags, and buried in a shallow grave; and chemical cleaners had been used to wash the inside of defendant's car. **State v. Bradley, 389.**

Jury instructions—castle doctrine—language mirroring the statute—The trial court's jury instructions on the castle doctrine in defendant's prosecution for first-degree murder were not erroneous where they accurately stated the law, including the rebuttable presumption that defendant had a reasonable fear of imminent death or serious bodily harm to herself or another, using language that mirrored the statute. **State v. Austin, 377.**

Sufficiency of evidence—castle doctrine defense—premeditation and deliberation—unarmed victim pleading on ground—There was sufficient evidence for the jury to convict defendant of first-degree murder where an unwelcome visitor (the victim) had been fighting with her on her driveway and she stood over the victim, who was lying unarmed on the ground saying, "please, please, just let me go," and then took several steps back and shot the victim in the head. The evidence allowed the jury to conclude that the State had rebutted the castle doctrine defense's presumption of defendant's reasonable fear of imminent death or serious bodily harm, and it was also sufficient to allow the conclusion that defendant acted with premeditation and deliberation. **State v. Austin, 377.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—exemption from review process—legacy medical care facility—acquisition or reopening—In a certificate of need (CON) case in which an applicant gave notice of its intent to reopen an ambulatory surgery center that was issued two CONs under its prior owner but then closed—a facility that the applicant argued was exempt from CON review as a legacy medical care facility—the determination by the Department of Health and Human Services that N.C.G.S. § 131E-184(h) required the applicant to first acquire legal ownership of the facility before obtaining a CON constituted a reasonable statutory interpretation within the agency's authority (in particular, of the phrase "acquire or reopen"). Where the administrative law judge (ALJ) failed to defer to the agency's decision when it ordered the agency to transfer the previously-issued CONs to the applicant, its decision was reversed and the matter remanded for entry of summary judgment in favor of the agency and the facility's current owner. **FMSH L.L.C. v. N.C. Dep't of Health & Hum. Servs., 157.**

Certificate of need—MRI scanner—change in project—new institutional health service—Where the Department of Health and Human Services (DHHS) issued a certificate of need (CON) to an orthopedic surgery clinic for a limited-use, fixed extremity MRI scanner as part of a state-sponsored research project, and where the clinic was allowed to replace the scanner with a more advanced model many years later, DHHS had the authority under N.C.G.S. § 131E-176(16)(e) to approve the clinic's application for a new CON—which removed the use restrictions under the original CON—without requiring a traditional need determination or competitive

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

review process. Under a plain reading of section 131E-176(16)(e), DHHS could issue the new CON because the clinic's application sought a "change in project" within one year after state health officials chose to end the research project, and the change would allow for additional MRI scanning services at a diagnostic center that was established under the project. **Wake Radiology Diagnostic Imaging LLC v. N.C. Dep't of Health & Hum. Servs.**, 673.

IMMUNITY

Governmental—liability insurance—waiver of immunity—inmate death—Where an inmate in a county detention center died from dehydration and malnutrition and his estate brought claims against multiple defendants (two detention officers, the county sheriff, and the county), defendants' purchase of liability insurance did not waive their governmental immunity because the policy in question specifically stated that it did not waive immunity. The sheriff's governmental immunity was waived only to the extent of the \$20,000 coverage in his sheriff's bond, which he had purchased to comply with N.C.G.S. § 162-8. **Butterfield v. Gray**, 549.

Libel suit involving election protest—absolute privilege—applicable only to direct participant in suit—In a libel suit brought by plaintiffs who were accused in an election protest of illegal double-voting, the defense of absolute privilege applied to the individual who filed the election protest, but not to a candidate's legal defense fund or the law firm defendants hired by that fund to prepare the election protest. Since the privilege extends only to statements made in the due course of a judicial proceeding, where neither the defense fund nor the law firm defendants directly participated in the election protest proceedings or acted on behalf of the individual protestor, they were not entitled to the protection of absolute immunity. **Bouvier v. Porter**, 528.

INDICTMENT AND INFORMATION

Fatal variance—resisting a public officer—basis for arrest immaterial—In a drug prosecution, there was no fatal variance between the indictment charging defendant with resisting a public officer, which stated defendant was being arrested for processing narcotics, and the evidence at trial, which showed defendant was found to possess marijuana before he ran away from officers, because the specific basis for the arrest was not an essential element of the offense and was therefore immaterial. The evidence identifying the officer's official duty as lawfully trying to take defendant into custody—an essential element—conformed to the allegations in the indictment. **State v. Tarlton**, 249.

Single indictment—possession of firearm by felon—two other charges—fatally defective—Where the indictment charging defendant with possession of a firearm by a felon also included two other offenses, the indictment was fatally defective because it violated N.C.G.S. § 14-415.1(c), which requires a separate indictment for possession of a firearm by a felon. **State v. Newborn**, 42.

JUDGMENTS

Supplemental proceedings—subject matter jurisdiction—no writ of execution issued—The trial court lacked statutory authority—and thus subject matter jurisdiction—to grant relief pursuant to Chapter 1, Article 31 ("Supplemental Proceedings") of the General Statutes where plaintiff had obtained a judgment

JUDGMENTS—Continued

against defendants but no writ of execution was issued to enforce the judgment or returned unsatisfied, in whole or in part, before plaintiff undertook the supplemental proceedings. The trial court's order compelling defendant to respond to discovery issued pursuant to Article 31 and imposing sanctions was vacated. **Milone & MacBroom, Inc. v. Corkum**, 576.

JURISDICTION

Personal—lack of—defense raised in responsive pleading—no waiver—In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, defendant did not waive its challenge to personal jurisdiction by allowing roughly three years to pass since plaintiff filed the complaint or by participating in limited discovery pertaining solely to the personal jurisdiction issue. Rather, defendant preserved its defense of lack of personal jurisdiction by raising it in its answer to plaintiff's complaint, pursuant to Civil Procedure Rule 12. **Cohen v. Cont'l Motors, Inc.**, 123.

Personal—specific—purposeful availment—foreign aircraft parts manufacturer—serving a North Carolina market—In an action brought against an out-of-state aircraft components manufacturer (defendant) after two North Carolina residents (decedents) died in a plane crash in North Carolina, the trial court erred in granting defendant's motion to dismiss for lack of personal jurisdiction. Defendant directly sold aircraft parts to a North Carolina-based maintenance servicer through an independent distributor in North Carolina, including the engine starter adapter that allegedly caused the crash and that another out-of-state company overhauled and sent back to the maintenance servicer, which then installed the adapter into decedents' private plane based on instructions that defendant directly provided in exchange for a subscription fee. Taken together, the facts indicated that defendant was actively serving a North Carolina market (albeit indirectly) for its products and, therefore, purposefully availed itself of the privileges of conducting activities in North Carolina. **Cohen v. Cont'l Motors, Inc.**, 123.

Public utility regulation—proposed business plan—advisory opinion—no actual controversy—Where the owner of hydroelectric generation facilities did not present a justiciable controversy when it sought a declaratory ruling from the North Carolina Utilities Commission that its proposed business plan—involving land it did not yet own and contracts it had not yet signed—fell within the landlord/tenant statutory exemption to public utility regulation, the Commission's decision stating that the owner would be subject to regulation as a public utility was vacated for being an advisory opinion. **State ex rel. Utils. Comm'n v. Cube Yadkin Generation LLC**, 217.

Standing—derivative—individual—claims—employment dispute—In a lawsuit arising from an employment dispute between a church and one of its former pastors, the pastor had individual standing to bring his counterclaim against the church and his third-party complaint against a group of church elders, in which he alleged that the church (through the elders) violated then-controlling church bylaws when firing him. A determination of whether the pastor also had standing to bring a derivative action on the church's behalf—seeking money damages from the elders for breaching their fiduciary duties to the church—required a preliminary determination of which church bylaws governed at the relevant time, which could not be made on appeal. **Nation Ford Baptist Church Inc. v. Davis**, 599.

MALICIOUS PROSECUTION

Elements—malice—governmental immunity—lack of probable cause—criminal charges against policemen—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the doctrine of governmental immunity barred plaintiffs' malicious prosecution claim against a city official and other police officers (defendants) where plaintiffs—who accused defendants of providing false or misleading information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges, but who admitted during depositions that they lacked specific knowledge of what information defendants shared with the SBI—could not meet their burden of showing defendants acted with malice. Further, because there was substantial evidence supporting a probability that plaintiffs committed the crimes they were charged with, plaintiffs could not show defendants acted without probable cause in investigating those charges. **Fox v. City of Greensboro, 301.**

MENTAL ILLNESS

Involuntary commitment—sufficiency of findings and evidence—threat to others—The trial court's involuntary commitment order declaring respondent to be mentally ill and dangerous to others was reversed where, as the State conceded, the trial court's findings and the evidence—the attending psychiatrist's conclusory opinion, an incomplete involuntary commitment recommendation form, and respondent's testimony—were inadequate to support a conclusion that respondent, who allegedly had threatened a judge, was dangerous to others. **In re K.V., 368.**

MOTOR VEHICLES

Impaired driving—specific jury instruction—chemical analysis results—as proof of alcohol concentration—In a prosecution for impaired driving, where the trial court instructed the jury that the “results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration,” the court did not err by denying defendant's request for a special jury instruction clarifying that this statement merely explains the standard for prima facie evidence of a person's alcohol concentration and does not create a legal presumption of defendant's guilt. The court adequately conveyed the substance of defendant's requested instruction by instructing the jurors that they were “the sole judges of the weight to be given to any evidence,” that they “should consider all the evidence,” and that it was their “duty to find the facts and to render a verdict reflecting the truth.” **State v. Guerrero, 236.**

NEGLIGENCE

Duty of care—transport of special-needs student—statutory authority to delegate—independent contractor rule—A school board was not liable for the actions of a bus driver who sexually assaulted a special-needs student where the board properly delegated its duty to safely transport the student pursuant to N.C.G.S. § 115C-253 to a non-profit transportation service, which operated as an independent contractor because the Board did not retain the right to exercise control over its performance of the contract. **Osborne v. Yadkin Valley Econ. Dev. Dist., Inc., 197.**

PATERNITY

Children born out of wedlock—challenges—proper motion—In a child support case in which defendant's paternity of a child had previously been adjudicated, the appellate court held that, even assuming defendant and the mother were not married at the time the child was born so that N.C.G.S. § 49-14(h) was applicable, the word "paternity" being written on defendant's motion to modify child support did not meet the standard of a "proper motion" pursuant to section 49-14(h), and defendant failed to allege any proper legal basis for requesting paternity testing to challenge the prior adjudication of paternity. **Guilford Cnty. v. Mabe, 561.**

PLEADINGS

Motion to amend—Rule 15—counterclaim and third-party complaint—employment dispute—In a lawsuit arising from an employment dispute between a church and one of its former pastors, the trial court did not abuse its discretion by granting the pastor's motion to amend his counterclaim against the church and his third-party complaint against a group of church elders. The church could not show any justifiable reason for denying the pastor's motion, nor did any material prejudice result from the court's decision to grant it. **Nation Ford Baptist Church Inc. v. Davis, 599.**

PROBATION AND PAROLE

Clerical error—checked box on judgment form—multiple probation violations as independent grounds for revocation—After the trial court determined that defendant had absconded and had used illegal drugs while on probation, the order revoking defendant's probation was remanded where the court erroneously checked a box on the judgment form indicating that both probation violations independently justified revocation. The record indicated that the court revoked defendant's probation solely on grounds that defendant absconded, and therefore the checked box was deemed a clerical error in need of correction. **State v. Thorne, 655.**

Jurisdiction—superior court—appeal from district court—revocation of probation—waiver of revocation hearing—The superior court lacked jurisdiction to hear defendant's appeal from the district court's orders revoking his probation for various misdemeanor offenses, where defendant waived his revocation hearing and admitted to violating the conditions of his probation. Importantly, N.C.G.S. § 15A-1347(b) precludes appeal of a sentence reactivation to the superior court where the defendant waives a revocation hearing. **State v. Flanagan, 228.**

Probation revocation—absconding—in-court admission by defendant—waiver of presentation of State's evidence—The trial court did not abuse its discretion in revoking defendant's probation where defendant, appearing pro se, repeatedly admitted during the revocation hearing that he had absconded from supervision, and therefore waived the requirement that the State present competent evidence that he violated a condition of his probation. **State v. Brown, 630.**

Probation revocation—judgment form—clerical errors—A judgment revoking defendant's probation was remanded for the trial court to correct three clerical errors in the judgment form, in which the court mistakenly listed a different crime than the one defendant was convicted of, listed the wrong number of probation violations alleged in the violation report, and inadvertently checked a box indicating that each violation alone could activate defendant's sentence when, in fact, the court revoked defendant's probation based solely on his absconding. **State v. Brown, 630.**

PROBATION AND PAROLE—Continued

Revocation of probation—absconding—sufficiency of evidence—The trial court did not abuse its discretion by revoking defendant's probation for absconding where defendant admitted at the revocation hearing that, during a routine probation office visit, he told law enforcement he had taken drugs, was asked to provide a drug screening sample, and then left the office without authorization and without providing the sample. Further evidence showed that defendant's probation officer went twice to defendant's last known address, but defendant was not there, and that defendant did not contact the officer or the probation office for at least twenty-two days after walking out on his drug screen. **State v. Thorne, 655.**

PUBLIC OFFICERS AND EMPLOYEES

Career employees—dismissal—just cause—agency analysis of resulting harm—Where a career state employee was dismissed from her employment with a county department of social services (DSS) for using a racial epithet, meaningful appellate review of the determination by DSS that just cause existed to terminate was precluded where the agency did not consider the required resulting harm factor, one of several necessary factors set forth in *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583 (2015). The order of the administrative law judge (ALJ) imposing alternative discipline—after acknowledging the agency's failure to fully exercise its discretionary review—was remanded with instructions for the ALJ to remand to DSS to conduct a complete investigation. **Ayers v. Currituck Cnty. Dep't of Soc. Servs., 514.**

RAPE

First-degree rape—second-degree sexual offense—convictions not mutually exclusive—The trial court did not err by accepting the jury's verdicts finding defendant guilty of both first-degree forcible rape and second-degree forcible sexual offense, even though the rape conviction required the jury to find defendant inflicted serious personal injury on the victim while the sexual offense conviction did not. Even if the verdicts had been inconsistent, they were still valid because defendant committed two separate acts, each of which supported one conviction, and therefore the convictions were not mutually exclusive (that is, guilt of one crime did not exclude guilt of the other), and because the State presented substantial evidence as to each element of each crime. **State v. Brake, 416.**

SEARCH AND SEIZURE

Motion to suppress—plain view doctrine—accessibility of firearm—material conflict in evidence—The trial court made insufficient findings to support a probable cause determination when it denied defendant's motion to suppress a firearm that was seized during a traffic stop where the court failed to resolve conflicting evidence about whether the firearm was readily accessible to defendant. Under the plain view doctrine—applicable here because the officer initially had probable cause to search defendant's car only for marijuana, but then inadvertently discovered the existence of a firearm in the center console by feeling and seeing the gun's hand-grip—the officer could seize the firearm, which required removing the center console panel and therefore constituted a separate search, only if it was readily apparent that the firearm was evidence of a crime (carrying a concealed weapon). The matter was remanded for further findings of fact. **State v. Newborn, 42.**

SEARCH AND SEIZURE—Continued

Traffic stop—duration—officer safety measures—reasonable suspicion of other crimes—Defendant's motion to suppress drugs and paraphernalia was properly denied where, although his vehicle was initially stopped for a broken taillight, the stop was not unconstitutionally prolonged because the officers diligently pursued investigation into the reason for the stop, conducted ordinary inquiries including license and warrant checks, and took necessary safety precautions after one passenger who was found to have active warrants stated he had a gun on his person. Moreover, there was reasonable suspicion of criminal activity where one officer had observed the same vehicle earlier in the night involved with a hand-to-hand transaction, which justified a canine sniff for narcotics. Challenged findings were either irrelevant to the ultimate question of whether the stop was unreasonably prolonged or supported by evidence. **State v. France, 436.**

Traffic stop—seatbelt violation—request for consent to search person—voluntariness—During a traffic stop for a seatbelt violation, an officer's request for consent to search defendant's person without reasonable articulable suspicion of unrelated criminal activity resulted in an unconstitutional extension of the traffic stop. In light of the unlawful detention, defendant's consent to the search of his person was not voluntary, and his motion to suppress drugs found in his pants pocket should have been granted. **State v. Johnson, 475.**

SENTENCING

Impaired driving—mitigating factors—statutory step-by-step formula—prejudice analysis—At a sentencing hearing for an impaired driving conviction, where defendant argued that three mitigating factors under N.C.G.S. § 20-179 existed but where the trial court only found one mitigating factor, the court erred by not finding one of the other factors (that defendant had a safe driving record) where defendant met his burden of proving that factor by a preponderance of the evidence. However, this error did not prejudice defendant because it did not cause the court to enter a sentence in excess of the presumptive term; rather, because the court determined under section 20-179's step-by-step formula that any mitigating factor substantially outweighed any aggravating factors, it was statutorily required to impose a Level Five punishment. **State v. Guerrero, 236.**

Presumption of regularity—severity of sentence—no improper considerations—At the sentencing phase of an impaired driving prosecution, where defendant's sentence fit within the statutory limit and was therefore presumptively regular and valid, defendant could not overcome the presumption of regularity by showing that the trial court sentenced him more harshly for exercising his right to a jury trial or that it improperly based the sentence on uncharged criminal conduct. Although the court stated that it would give defendant the same sentence he received in his prior trial (for the same charge) if he wanted to "accept responsibility," the court also said that its job was not to punish defendant for rejecting a plea offer but to be fair and impartial. Additionally, defendant did not assert his Fifth Amendment privilege, object, or ask to speak with his attorney when the court questioned him about his prior illegal drug use. **State v. Guerrero, 236.**

Prior record level—calculation—unclear from record—stipulation invalid—Defendant was entitled to a new sentencing hearing because his stipulation to a prior record level worksheet that listed eighteen convictions was invalid where the record was indeterminate regarding which convictions were used to assign twelve points (making defendant a prior record level IV offender for sentencing purposes). The

SENTENCING—Continued

worksheet included several crossed-out and hand-written items, making it unclear whether the trial court improperly included convictions used as a predicate to establish defendant's status as a habitual felon. Further, if any of the out-of-state convictions were used, defendant's stipulation was inadequate to establish that they were substantially similar to North Carolina offenses, which involved a question of law to be proved by the State. **State v. Bunting, 636.**

STATUTES OF LIMITATION AND REPOSE

Abuse of process—criminal charges against policemen—withholding exculpatory evidence—last tortious act—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, plaintiffs' abuse of process claim against a city official and other police officers (defendants) was not time-barred. Because the three-year limitations period for abuse of process claims commences upon the last tortious act complained of, and because plaintiffs alleged a number of continuous tortious acts by defendants following plaintiffs' arrest—such as withholding exculpatory evidence on plaintiffs' criminal charges and using the pending prosecution to try to force plaintiffs out of the police department—the limitations period on plaintiffs' abuse of process claim began to run on the day that the last tortious act concluded. **Fox v. City of Greensboro, 301.**

Legal malpractice—discovery of defect—genuine issue of material fact—In plaintiff's legal malpractice suit filed against his attorneys after his ex-wife successfully challenged a property settlement, the trial court improperly granted summary judgment to the attorneys after determining that the suit was time-barred. There was a genuine issue of material fact regarding when plaintiff reasonably could have discovered his attorneys' mistakes or any resulting consequences. It could be inferred from the evidence that plaintiff could not have discovered the mistakes until after his ex-wife moved to dismiss the domestic action, particularly where his attorneys continued to insist to plaintiff that the agreement was enforceable despite their failure to notarize documents related to the settlement. **Podrebarac v. Horack, Talley, Pharr & Lowndes, P.A., 624.**

WILLS

Patent ambiguity—personal property—testator's intent—Where a will contained a patent ambiguity regarding certain property—by bequeathing "all my personal property" to defendant but making conflicting bequests of specific personal property to others—the trial court properly resolved the discord in light of the prevailing purpose of the entire will and relevant attendant circumstances, concluding that certain contested property was intended to pass to plaintiffs rather than defendant. **Treadaway v. Payne, 664.**

ZONING

Unified development ordinance—board of adjustment decision—review by trial court—application of whole record test—In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance, the trial court erred in its application of the

ZONING—Continued

whole record test by replacing the board's judgment—as to the number of campsites at the campground on the determinative date—with its own judgment, where the board's determination was supported by substantial evidence. **85' and Sunny, LLC v. Currituck Cnty., 1.**

Unified development ordinance—board of adjustment decision—review by trial court—new facilities—In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance (UDO), the trial court erred by reversing the board's conclusion that new facilities proposed by petitioner were an impermissible expansion, enlargement, and intensification of a nonconforming use and not permitted under the UDO. However, the trial court properly affirmed the board's conclusion that petitioner's proposed swimming pool was not permitted under the UDO. **85' and Sunny, LLC v. Currituck Cnty., 1.**

Unified development ordinance—board of adjustment decision—review by trial court—standard of review—In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance, the trial court properly articulated and applied the appropriate standard of review for each issue on appeal. **85' and Sunny, LLC v. Currituck Cnty., 1.**

